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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KAREN J. WILLIAMS,

Petitioner,

v.

VALENCIA COUNTY SHERIFF'S DEPARTMENT ET AL.,

Respondents.

On Petition For Writ of Certiorari
To the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

KAREN J. WILLIAMS
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86 pp

Petitioner is a *pro se* litigant seeking the Court's clarification regarding the rights and treatment of *pro se* plaintiffs, and their entitlement to adequate written notice of procedure, and the opportunity for correction of errors due to excusable neglect, inadvertence and mistake, specifically when pleading viable 42 U.S.C § 1983 lawsuits.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a pro se plaintiff in a 42 U.S.C § 1983 action can be fairly described by a tribunal as making a deliberate and/or conscious decision to pursue an unsuccessful legal strategy when after the plaintiff's motions for formal discovery were denied, following the placement of the case on the administrative track with no discovery, the *pro* se plaintiff requested discovery within her pleadings in opposition to motions for summary judgment and/or dismissal, instead of with a Fed. R. Civ. P. Rule 56(f) affidavit?

2. Whether a pro se plaintiff's filing of affidavits with a Motion for Reconsideration, after the plaintiff's § 1983 action was dismissed primarily due to a lack of affidavits, requires that the case be reinstated if genuine material facts exist, and if there is evidence that qualified and absolute immunities should not be granted?

3. Whether a tribunal can state that after affidavits have been submitted and pleadings verified, it can uphold its dismissal of a *pro* se litigant's viable § 1983 case for other technical errors?

PARTIES TO PROCEEDING

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Attorney of record for Valencia County Defendants is:
Sean Olivas of Keleher & McLeod
P.O. Drawer AA
Albuquerque, NM 87103
(505) 346-4646
for Valencia County Sheriff's Office "VCSO;" Detective (Agent) John Mallory aka U.S. Drug Enforcement Officer; VCSO Sheriff Juan Julian, Undersheriff DJ (DC) Jackson, Captain Wes Mallory; VCSO civilian employees Debra Mallory, Donna Wardlaw, Connie Carter, Ana Marquez, and Real Name Unknown Dispatcher(s); Valencia County Commission and commissioners

Attorney of record for State of New Mexico defendants is:
Barbara Pryor of McCary, Wilson & Pryor
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Albuquerque, NM 87109
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for State Police Officer Audi Miranda; Attorney General's Office Investigator Steve Scharon; Los Lunas Magistrate Court Clerks Carla Gonzales, Lisa Waggoner, and Teresa Chavez; Belen Magistrate Court Clerks Brenda Gallegos, J. Sanchez, and Real Name(s) Unknown Clerks.

Claims against the United States of America have been dismissed, and are not contested. Defendant Arley Sanchez, a private individual, defaulted.

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JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit dated April 10, 2002, upholding the decision of Judge Paul Kelly, Jr., a circuit judge acting by designation in the U.S. District Court for New Mexico, granting summary judgment and/or dismissal for the defendants, entered March 22, 2001, and its May 31, 2001 denial of Petitioner's Motion for Reconsideration or to Hold in Abeyance and/or for relief from order under Rule 60(b), filed April 6, 2001 but not entered until April 25, 2001, is herein appealed. *Pro Se* Petitioner Karen J. Williams's timely petition to the Tenth Circuit Court of Appeals was denied in an order filed April 10, 2002 by Circuit Judges Henry, Anderson, and Lucero.
Her petition for rehearing was denied on April 26, 2002. On July 22, 2002, U.S. Supreme Court Justice Stephen Breyer granted an extension of time until September 23, 2002 for the filing of the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1).

STATUTES INVOLVED

Constitution of the United States, Fourth Amendment.

The right of the people to be secure in their persons ... and no Warrants shall issue, but upon probable cause, supported

by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

... Nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ... and to be informed of the nature and cause of the accusation ... and to have the assistance of counsel for his defense.

Eighth Amendment

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment

... Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.... .

STATEMENT OF THE CASE

Karen J. Williams, a *pro se* plaintiff, filed her 42 U.S.C. § 1983 lawsuit at the U.S. District Court for the District of New Mexico on February 17, 2000. On May 24, 2000, a first amended complaint was filed. Counsel for the Valencia County Defendants denied the allegations in an answer filed June 23, 2000. Instead of an answer, counsel for the State of New Mexico defendants filed a motion for partial dismissal of claims with memorandum in support. On August 1, 2000, Judge Paul Kelly, Jr., a Tenth Circuit Judge sitting by designation, filed an order granting in part the state defendants' motion. That order is not disputed here. Subsequently, state defendants filed an answer on August 17, 2000, denying Williams's allegations.

Following a Rule 16 scheduling conference, Williams filed two motions for discovery, since Magistrate Judge Lorenzo Garcia had put the case on an administrative track, with no formal discovery allowed. Williams also filed motions to disqualify and/or recuse Judge Garcia, as well as filing motions for a protective order and for an extension of time to serve disclosures. None of these motions were granted. Judge Garcia recused himself, however, despite Williams's filing the aforementioned motions without an affidavit.

On October 25, 2000, the District Court entered a default judgment against Defendant Arley Sanchez, a private individual. In a separate, related lawsuit, Williams

also received a default judgment in state District Court. Sanchez's attempt to overturn that judgment by hiring counsel and filing a motion alleging that he had representation in the federal court, which he didn't, and so had expected an answer to be filed in state court, was not accepted by the court, and that motion was denied. A damages hearing is pending in state court.

On March 22, 2001, Judge Kelly granted the motions for summary judgment and/or dismissal filed by the Valencia County and State of New Mexico defendants on October 20 and October 19, 2000, respectively. Williams filed a motion for reconsideration on April 6, 2001, with three accompanying affidavits. Judge Kelly denied that motion on May 30, 2001.

On April 10, 2002, a three-judge panel of the Tenth Circuit court, consisting of Henry, Anderson, and Lucero, denied Williams's appeal. A motion for panel rehearing was denied on April 26, 2002. Williams was given a two-month extension to file her Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Williams contends that her lawsuit is viable and should not have been dismissed due to technical errors. Williams's initial failure to submit affidavits should have been forgiven under Fed. R. Civ. P. 60(b). Williams answered motions for summary judgment and/or dismissal with *four* motions in opposition with exhibits. She was unaware of the requirement that contravening affidavits were required and Rule 56(f) procedure had not been adequately explained and its necessity made clear.

Despite Williams correction of the affidavits omission, the lower courts upheld the granting of summary judgment and dismissal with its attendant granting of qualified and absolute immunities. In part, because they rejected her Rule 60(b) argument, and in part, because they found language usage errors in her amended complaint.

Therefore, the Court is asked to determine whether a tribunal should be required to give written notice of Rule 56 requirements to *pro se* litigants.

The Court is also asked to determine whether when the omission of affidavits has been corrected, the court can uphold its granting of summary judgment and dismissal, along with the granting of immunities, if it is a viable case with genuine issues of material fact.

Also, at issue, is the appropriateness of the commonly used procedure in the U.S. District Court of New Mexico of placing § 1983 cases on the administrative track, with no discovery allowed.

The Court is asked to clarify procedures pertaining to *pro se* civil rights litigants to protect their rights and prevent the dismissal of their cases due to correctable technicalities, when they are viable cases.

REASONS FOR GRANTING THE WRIT

The U.S. Supreme Court should grant Williams's petition since it addresses questions that need clarification regarding the rights and responsibilities of *pro* se litigants.

It is the prerogative of Judge Paul Kelly, Jr., a Tenth Circuit Judge, acting by designation, and U.S. Magistrate Judge Lorenzo Garcia, to hold a *pro se* plaintiff to the same standards as attorneys in 42 U.S.C. § 1983 actions. This policy, as illustrated by *Williams v. Valencia County Sheriff's office et al.*, is not favored, and dismissing valid cases on a technicality is not favored either. Acting as a *pro se* plaintiff may be a litigant's only choice due to financial constraints and/or an atmosphere of political corruption. Dismissing a case where the *pro se* litigant has made numerous charges of blatant and outrageous violations of her constitutional rights because of an initial lack of affidavits, prevents her case from being heard on its merits, particularly when she provided

numerous exhibits proving her allegations, which the defendants failed to contravert.

Allowing defendants, who acted under color of state law, to knowingly violate Williams's clearly established statutory and constitutional rights, dismissing the case and granting summary judgment because as a *pro* se plaintiff Williams unknowingly made technical errors, circumvents justice and allows guilty parties to go unpunished.

This Court is asked to consider whether the grantings of motions for summary judgment and/or dismissal when the nonmoving party is pro se should be reconsidered if evidence exists and affidavits are later submitted, making the reasons for dismissal due to technical violations moot. And, it is also asked to decide whether it is proper to dismiss a pro se litigant's case for correctable errors.

This Court also is asked to issue uniform guidelines for informing *pro* se litigants of information that they would likely not find out otherwise, and wouldn't know they needed to research otherwise. Written instructions would be more appropriate as oral instructions can be misinterpreted or not given, but alleged as given. It should be required that *pro* se litigants be informed of the necessity of affidavits and the consequences for failing to file them. Such a requirement would warn pro se litigants, protecting them from dismissals on unforeseen technicalities, and would mitigate abuses by judges and opposing counsel. The Third Circuit and the District of Columbia circuit courts have encouraged such notice. Cudzich v. U.S.I.N.S., 886 F.Supp. 101 (D.D.C. 1995). See also Neal v. Kelly, 963 F.2d 453, 454 (D.C. Cir. 1992).

In *Kotteakos et al. v. United States, Regenbogen v. Same,* 66 S.Ct. 1239, the Court decided that the appeals court or reviewing court should give judgment as required

regardless of technical error "which do not affect the substantial rights of the parties."

In regard to other technical errors, Conley v. Gibson, 355 U.S. 41, 45-46 (1957) states that viable claims should not be dismissed for (allegedly) failing to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." And dismissing cases is unwarranted unless it is "frivolous on its face or wholly insubstantial."

If the U.S. Supreme Court grants this petition, and eventually decides in its favor, it would result in tribunals declining to dismiss viable *pro se* civil rights cases without taking steps to mitigate the disadvantages of such litigants. This would hopefully lead to increasingly just courts and less rogue police activity. The Court is asked to review this case, setting uniform standards for the treatment of *pro se* litigants in § 1983 lawsuits, in the interests of justice and due process of law.

The best and most important cases may not always have an attorney at the helm. The absence of an attorney should not be a fatal disadvantage.

Echoing Williams's belief that this case is important to others besides Williams, Sean Olivas, counsel for Valencia County defendants, wrote a letter to Judge Kelly after the Tenth Circuit upheld his U.S. District Court decision, requesting the publication of Judge Kelly's decision as it was *precedent setting for pro se litigants* and stating that the also unpublished Tenth Circuit decision was not as detailed. Sean Olivas said that it was precedent setting, in part, because it put *pro se* plaintiff's on notice that they had to follow the rules. What he didn't say is that it set precedent by holding *pro se* litigants to the same standards as members of the bar.

I. THE DECISION OF THE TENTH CIRCUIT UPHOLDING THE U.S. DISTRICT COURT'S DISMISSAL OF A PRO SE LITIGANT'S § 1983 LAWSUIT FOR TECHNICAL ERRORS RAISES IMPORTANT CONSTITUTIONAL CONCERNS REGARDING THE RIGHTS AND TREATMENT OF PRO SE LITIGANTS IN § 1983 ACTIONS AND THE IMPORTANCE OF ALLOWING VIABLE CASES TO ENGAGE IN AT LEAST LIMITED DISCOVERY AND BE DECIDED ON THEIR MERITS AS THE COURT HAS FOUND IN CRAWFORD-EL V. BRITTON, 523 U.S. 574, 597-600 (1998) AND WITH KOTTEAKOS ET AL. V. UNITED STATES, REGENBOGEN V. SAME, 66 S.CT. 1239.

Under the precedent and practice of the Tenth Circuit and Judge Paul Kelly Jr., a circuit judge sitting by designation at the U.S. District Court, as well as U.S. District Court Magistrate Judge Lorenzo Garcia, *pro se* litigants are held to higher standards, comparable to those required of attorneys, in the deposition of § 1983 cases, and are given no leeway or instruction tailored to their *pro se* status. In contrast, the U.S. Supreme Court and several circuit courts have declined to expect unflawed legal pleadings from *pro se* litigants.

In its April 10, 2002 order at 5, the Tenth Circuit affirmed the decision of Judge Kelly, acting by designation (supposedly a temporary assignment under federal law 28 U.S.C.A § 291, but one that has existed for several years), deciding that Williams, a *pro se* plaintiff in a § 1983 action, having been told of the Rule 56(f) requirement, (although without specific instruction as to its necessity or procedure) had then made a deliberate or conscious decision not to file

an affidavit, even though Williams's asked for discovery within two of her four pleadings in opposition to motions for summary judgment and/or dismissal. However, even if Williams had known the necessity of a Rule 56(f) affidavit, it probably would not have been necessary to defeat the defendants' motions for summary judgment and/or dismissal had she filed an affidavit swearing to her pleadings and refuting defendants' affidavits. But Williams was not informed of the need for contravening affidavits, nor was she given any instruction on Rule 56 in general or told that motions for summary judgment require a specific type of response.

Judge Kelly's misconstrued the situation and determined that Williams's failure to understand the necessity of filing a Rule 56(f) affidavits, and the consequences for its omission, were not excusable. *Neither Judge Kelly nor the Tenth Circuit termed Williams's lack of any contravening affidavits, in opposition to defendants' affidavits, as deliberate or conscious, however.*

Other courts have found differently when faced with affidavit omissions by *pro* se litigants, and have considered the *pro se* plaintiff's failure to understand the procedure or its consequences key to its decisions.

These courts have laid down guidelines whereby the affidavit process overall (not just the Rule 56(f) discovery process) has to be explained to *pro se* litigants, along with the results of failing to adhere to procedures. This opinion has been shared by courts other than the District of Columbia and the Seventh Circuit, whose opinions will be cited. Other courts, who have come to the same conclusion, include the fourth and first circuits. Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975); Whiting v. Maiolini, 921 F.2d 5 (1st Cir. 1990).

In the District of Columbia Circuit Court, it was determined that "consistent with the liberal treatment

generally afforded pro se litigants," only after the affidavit process has been explained in detail to the pro se litigant with a written notice, including instructions informing the litigant that failure to file an affidavit or documentary evidence contravening the assertions in the moving parties pleadings would result in their assertions being accepted as true, can the pro se litigant's case fairly result in dismissal. *Cudzich v. U.S.I.N.S.*, 886 F. Supp. 101, 105 (D.D.C. 1995). See also *Neal v. Kelly*, 963 F.2d 453, 454-57 (D.D.C. 1992). And while Williams may not have filed an affidavit initially, she did file documentary evidence within the meaning of *Cudzich*.

Neal at 454 states: "Prisoner proceeding pro se is entitled to receive notice of consequences of failing to respond with affidavits to defendant's motion for summary judgment." And, citing *Lewis v. Faulkner*, 689 F.2d 101 (7th Cir. 1982) at 102, *Neal* states: "If counsel for the defendants fail to provide the appropriate notice, then it is the district judge's responsibility to do so."

Williams was given no notice or explanation that failing to file answering affidavits would result in the defendant's allegations being accepted as true. One *not two* orders from the magistrate, which was an order putting the case on the administrative track, told Williams to file a Rule 56(f) affidavit if she wanted discovery, but it did not tell her the absolute necessity of such an affidavit and it *failed to mention the need to respond with affidavits to defendants's affidavits*. To Williams, she could request discovery within her pleadings, and she obviously had no knowledge of Rule 56. Williams responded as she would to any motion, offering exhibits (documentary evidence) and requesting discovery within her pleadings, making it clear that she was unaware of the special requirements of response to motions for summary judgment and/or dismissal. It is not logical to suggest that this was deliberate or conscious as Williams

was diligent in preparing her four pleadings and exhibits in opposition.

Williams, despite her initial lack of affidavits, was diligent and acted in good faith in filing her four motions in opposition, two requesting discovery, along with exhibits. When a plaintiff may have misunderstood the affidavit requirement, arguing instead for discovery within her pleadings, judgment could be postponed. *Miller v. Beneficial Management*, 977 F.2d 834 (3rd Cir. 1992). This leniency conflicts with the Tenth Circuit, which holds pro se litigants to the same strict standards as it does attorneys.

In his September 22, 2000 order denying Williams's Motion for Reconsideration, Judge Kelly cited a case implying that Williams had deliberately failed to file a Rule 56(f) affidavit, and so could be held responsible for this error. "[A] party who simply misunderstands or fails to predict the legal consequences of [her] deliberate acts cannot later, once the lesson is learned, turn back the clock to undo those mistakes." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999).). In Yapp, it was found that litigation mistakes that were the "result of a deliberate and counseled decision by complaining party" were not eligible for relief. In Yapp, the litigant, who had counsel, filed a lawsuit based on the same Fair Labor Standards Act claims that had been previously dismissed with prejudice following settlement.

In *Neal v. Kelly*, 963 F.2d 453, 455 (D.C. Cir. 1992), that court determined that Neal's "response did not suggest that he understood the significance of the exhibits and affidavits accompanying the defendant's filing." But Williams's similar uninformed response did not engender such understanding in the Tenth Circuit.

In *Johnson v. United States*, 405 F.2d 1072, 1074 (D.D.C. 1968) that circuit decided that when attempting to understand a pro se litigant's mistake it was an "equally valid assumption was that he was not knowledgeable on the

subject. . . [T]he endeavors of lay litigants are not to be scrutinized for the precision expected" of lawyers.

With Kotteakos v. United States, 66 S.Ct. 1239 (1946), this Court decided that harmless error provisions are to "substitute judgment for automatic application of the rules ..., allowing "reviewing court to give judgment without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties." Williams herein states that her initial lack of affidavits, which was corrected with her Motion for Reconsideration, is a harmless error, as well as one due to excusable neglect, inadvertence and mistake.

Conversely, in denying Williams's Motion for Reconsideration, upheld by the Tenth Circuit, Judge Kelly cited cases where reconsideration was denied when cases were dismissed as *sanctions for discovery violations*. These cases aren't germane to *Williams v. Valencia County Sheriff's Office et al.*

For example, a case cited by Judge Kelly in his order denying Williams's Motion for Reconsideration at 4, *Creative Gifts, Inc. v. UFO*, 235 F.3d 540, 541 (10th Cir, 2000) was not a dismissal due to the lack of an affidavit by the pro se litigant, as happened in Williams's case, but a dismissal levied as a sanction for discovery violations shown to be numerous and flagrant. In *Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994), another case cited by Judge Kelly, the plaintiff had failed to file a timely notice of appeal. *Ogden* was also cited by the Tenth Circuit in its April 10, 2002 order at 5, stating that *pro* se litigants had to be held accountable if they didn't follow the rules.

In his March 22, 2001 order at 13, Judge Kelly, later upheld by the Tenth Circuit, stated that he had given Williams additional time to correct her affidavit error. *Jaxon v. Circle K Corp.*, 773 F.3d 1138, 1140 (10th Cir. 1985). But this additional time is only helpful if the pro se litigant knows

her errors can be corrected, and Williams did not know she had this option or that the court would automatically decide for the defendants if she didn't take some type of action. In *Neal* at 456, citing *Lewis v. Faulkner*, 689 F.2d 101 (7th Cir. 1982) at 102, the Seventh Circuit stated that a reasonable opportunity to correct isn't enough "if knowledge of the consequences of not making use of it is wanting."

Judge Kelly incorrectly suggested that Williams had stated that she planned to file an affidavit and then did not file one in his May 30, 2001 order at 4 denying Williams's October 17, 2000 Motion for Reconsideration or to Hold in Abeyance, and/or Relief from Order Under Rule 60(B) [hereinafter known as Motion for Reconsideration]. That motion was accompanied by three affidavits, including a Rule 56(f) affidavit. But Williams did not state that she specifically planned to file an affidavit in her October 11, 2000 Motion to Compel Discovery or in her October 17, 2000 Amended Motion to Compel Discovery, as alleged by Judge Kelly.

In fact, Williams stated that she would file either a motion *or* an affidavit, making it clear that she did not understand that discovery could be had only if she filed an affidavit, as she stated she would file one or the other, as follows: . "The Plaintiff plans to file a motion *or* affidavit requesting that discovery be complete and total as she had expected per the original Initial Pretrial Report so she may call witnesses who can dispute the validity and truthfulness of documents and things provided by opposing counsel."

In her Motion for Reconsideration, Williams explained that she did not file an affidavit initially since she was preparing the pleadings herself, and did not realize it was required. She thought the defendants had affidavits because they had counsel and weren't filing pleadings personally. If Williams were an attorney, she likely would not have needed an affidavit. .

Moreover, not all of the defendants filed affidavits. None of the supervisory defendants or the Valencia County Commissioners filed them. Their lack of affidavits should have mandated at least partial judgment in Williams's favor. Improperly resting on the defense that their actions were excused under legislative immunity, the Valencia County Commission failed to file any affidavits. Their actions in failing to respond to a letter from Williams dated May 27, 1997, prior to her second false arrest and imprisonment on July 11, 1997, in failing to investigate that letter, or oversee and train the Valencia County Sheriff's Department are actionable. And the supervisors, who ignored Williams's complaints and were aware, and even participated in constitutional violations, are liable.

Despite the correction of the affidavits omission by Williams with her Motion for Reconsideration, the Tenth Circuit, with its Order and Judgment of April 10, 2002 at 4-5, states that it was "otherwise appropriate" to grant summary judgment and/or dismissal, citing Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828, 832-33 (10th Cir. 1986). Again, the court is citing a case where the plaintiff was represented by counsel, and was not acting pro se. (Also, the court did not state that Williams was informed of the requirements for contravening affidavits).

If Williams had submitted affidavits, the motions for summary judgment and dismissal could not have been proper granted, making dismissal not "otherwise appropriate."

The Tenth Circuit in its order of April 10, 2002 at 5 also incorrectly stated as follows:

"The magistrate judge clearly informed plaintiff of the required procedure for obtaining additional discovery at the Rule 16 conference, including the requirement that she file a Rule 56(f) affidavit, and this information was repeated to plaintiff in at least two written orders entered

prior to summary judgment order. Plaintiff's pro se status does not excuse her obligation to comply with the fundamental requirements of the Federal Rules of Civil Procedure and the explicit orders of the magistrate judge and district court." And at 3-4, "The district court and magistrate judge informed plaintiff on at least three occasions that if she believed additional discovery was needed, she needed to file an affidavit pursuant to Fed. R. Civ. P. 56(f) seeking authorization to conduct discovery."

These statements are false. The magistrate judge, Lorenzo Garcia, refused to explain the Rule 56(f) procedure to Williams at the scheduling conference. *The allegation that he explained the procedure was made by opposing counsel in their replies to Williams's motions in opposition.* There was only one written (unfiled) order from Judge Garcia and it did not explain the necessity of a Rule 56(f) affidavit and it did not address the need for contravening affidavits. The second written order from Chief Magistrate William Denton, denied discovery but did not refer to a Rule 56(f) affidavit or Rule 56 in any fashion. The District Court Judge *did not* tell Williams, either orally or in writing to file affidavits or refer to Rule 56. And the record will show that these statements are false.

In an (unfiled) order placing *Williams v. Valencia County Sheriff's Office et al.* on the administrative track, from U.S. Magistrate Judge Garcia, he wrote only that Williams needed to file a Rule 56(f) affidavit if she wanted discovery. Judge Garcia's only reference to Rule 56(f) was to state as follows at 2: "Upon receipt of the Defendants' motions, should Plaintiff believe that some discovery is necessary, she should proceed by filing a Fed. R. Civ. P. 56(f) affidavit, specifically indicating what discovery she proposes to undertake, what and how evidence adduced in that discovery will assist in responding to the motions."

U.S. Chief Magistrate William Denton's order did not discuss Rule 56 or Rule 56(f) at all. Therefore, the Tenth Circuit's statement that Williams received notice in two orders is incorrect. And Williams was not informed of this requirement by the U.S. District Court. In an informal conversation with Judge Kelly's clerk, Bob Tupper, she told him that she was planning on filing an affidavit only. He suggested that she file motions in opposition, in case her affidavit wasn't accepted. So, after deciding to file motions in opposition, Williams thought the Rule 56(f) affidavit was no longer necessary.

And as Williams stated in her pleadings filed soon after that Rule 16 scheduling conference with U.S. Magistrate Lorenzo Garcia on September 15, 2000 (which was not recorded or on the record), Judge Garcia had refused to answer her questions, and was verbally abusive to her.

In Plaintiff's Motion for Recusal or Disqualification of Magistrate Judge Through Federal Law or Removal, filed before the summary judgment process began on September 20, 2000, Williams stated the following at 7-8: "This (judge's) attitude offends and disgusts the Plaintiff, who does not appreciate being spoken to disrespectfully, asked inappropriate questions, told "that's enough" while she's talking, and having her questions on procedure ignored." Williams was referring to Rule 56(f). And in the accompanying Motion for Protective Order at 2-3 and 6-7, Williams said he also told her, while refusing to read her letter of complaint about opposing counsel, that *after they had filed their motions for summary judgment and/or dismissal, Williams would not have to speak to them again anyway.*

Williams's account of Judge Garcia's behavior was not disputed by counsel for Valencia County or State of New Mexico defendants until after Williams' filed her motions in opposition. At that time, counsel for Valencia County

defendants falsely alleged that Judge Garcia had "specifically commanded Plaintiff, in plain language, to abide by the tenets of Fed. R. Civ. P. 56 in responding to the MSJ." (VC) Defendants' Reply in Support of their Motion for Summary Judgment at 1.

All of the aforementioned motions were denied, in part, because Williams *did not file an affidavit*. Judge Garcia later recused himself, and eventually, the case was assigned to Judge Denton for discovery purposes.

The lower courts belief that the Rule 56(f) affidavit was adequately explained to Williams is misplaced. And the initial omission of affidavits is a common mistake among *pro se* litigants.

In the Third Circuit, the court upheld the dismissal of a *pro* se plaintiff's case, but did not do so because of the lack of an affidavit, which it found excusable. It was due to the absence of material fact. *Lockhart v. Hoeinstine*, 411 F.2d 455, 456, 458-459 (3rd Cir. 1969).

When denying Williams's motions pertaining to Judge Garcia, Judge Kelly also stated that the magistrate had acted within the bounds of his discretion by putting the case on the administrative track and only ordering disclosures pursuant to Fed. R. Civ. P. 26(a)(1)(B). But the denial of all formal discovery, even when the qualified immunity defense is alleged, is at odds with the U.S. Supreme Court decision in Crawford-El v. Britton, 523 U.S. 574, 597-600 (1998). In Crawford-El, the court stated that tribunals had options before granting discovery, such as requesting a reply to the defendant's answer or granting a defendant's motion for a more definite statement under Fed. R. Civ. P. 12(e).

In the alternative to requesting a reply or definite statement, according to *Crawford-El*, the court may first decide whether "assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law." And "If the plaintiff's action survives these initial

hurdles and is otherwise viable, the plaintiff ordinarily will be entitled to some discovery."

The Tenth Circuit and the U.S. District Court's interpretation of *Crawford-El* is that Judge Sanchez, the magistrate, was correct in putting *Williams v. Valencia County Sheriff's Office et al.* on the administrative track without any formal discovery. At 4, Judge Kelly stated: "Given the immunity defenses in this case, the magistrate judge acted within his discretion in ordering such limited discovery," citing *Crawford-El* at 574, 597-600. But it wasn't limited discovery; it was no formal discovery, and this is at odds with *Crawford-El*.

In its April 10, 2002 order, the Tenth Circuit stated at 3 that "the magistrate judged stayed further discovery" because counsel for the defendants planned to file motions for summary judgment and/or dismissal." But it fails to note that the only discovery allowed were disclosures, ordered to be exchanged ten (10) days after the Rule 16 scheduling conference. At the time of the conference, none of the parties had exchanged disclosures.

In upholding Judge Kelly's order, the Tenth Circuit in its order at 3-4, stated that it was appropriate to stay discovery with an administrative order, citing Workman v. Jordan, 958 F.2d 332, 336 (10th Cir. 1992), and that there is no requirement that discovery take place before summary judgment is awarded, citing Weir v. Anaconda Co., 773 F.2d 1073, 1081 (10th Cir. 1985). These Tenth Circuit decisions, however, do not correctly interpret or follow the aforementioned steps to be taken before deciding the discovery issue outlined in Crawford-El.

Despite giving opposing counsel all of her readily-available discovery (with the exception of some tapes needing enhancement), Williams was not given any formal discovery, including the opportunity to file interrogatories. It was a one-sided exchange for Williams. The court's decision put Williams at a disadvantage, particularly when

prior to the conference, Judge Garcia required Initial Disclosures and an Initial Pretrial Report (IPR) wherein Williams had to list all her exhibits and *16 witnesses,* effectively unveiling her entire case, when he should have anticipated the qualified immunity defense and held a conference first, before asking for the IPR report.

In her Motion for Reconsideration, Williams explained that she did not file an affidavit initially since she was preparing the pleadings herself, and did not realize it was required. She thought the defendants had affidavits because they had counsel and weren't filing pleadings personally. If Williams were an attorney, she likely would not have needed an affidavit.

Finally, both lower courts improperly rejected Williams's argument that the defendants' motions for summary judgment could not be granted because the date they would be filed was not part of the initial pretrial report (IPR). That Local rule D.N.M. LR-Civ. 56(1(a), as cited from the booklet distributed by the U.S. District Court, states as follows: "Time for Filing. Motions of summary judgment will not be considered unless filed within the deadline set in the Initial Pretrial Report to allow sufficient time for the opposing part to file counter-affidavits, and responses thereto, and to permit the Court reasonable time to hear arguments, if granted, and to consider the merits." In direct opposition to this rule, opposing counsel failed to give any deadline dates in their IPR.

II. THE DECISION OF THE TENTH CIRCUIT AND THE U.S. DISTRICT COURT OF NEW MEXICO TO UPHOLD A DISMISSAL OF A PRO SE LITIGANT'S CIVIL RIGHTS CASE AND THE GRANTING OF IMMUNITIES AFTER AFFIDAVITS WERE FILED FOR OTHER ALLEGED DEFICIENCIES IS IMPROPER WHEN GENUINE ISSUES OF MATERIAL FACT

EXIST, AND IS IN CONFLICT WITH THE U.S. SUPREME COURT AND OTHER CIRCUIT COURTS. *FRANKS V.* NIMMO, 796 F.2D 1230 AND UNITED STATES V. GAUBERT, 499 U.S. 315, 327 (1991).

The U.S. District Court of New Mexico and the Tenth Circuit, when faced with pro se litigants such as Williams, are choosing to dismiss viable cases on technicalities, when other courts have chosen to require corrections, with notice to the pro se litigant of the errors made.

Williams's four pleadings in opposition with exhibits were verified after the fact in her Motion for Reconsideration, which had three accompanying affidavits, including a Rule 56(f) affidavit, and one affidavit apiece addressing Valencia County defendants and State of New Mexico defendants, respectively.

Once Williams's had filed these affidavits, the courts should have acknowledged that she had fulfilled her technical legal requirements for responding to motions for summary judgment and/or dismissal. It was no longer appropriate for the court to decide the truth of the matter once Williams had filed her affidavits. As a reviewing court, the Tenth Circuit (and Judge Kelly) are charged with accepting "as true all the factual allegations in the complaint." *United States v. Gaubert*, 499 U.S. 315, 327 (1991).

At this point, they should be restricted to deciding if there was an issue of fact to be tried, and reviewing the affidavits and exhibits. The courts, including the Tenth Circuit, have found that a nonmoving party's *conflicting affidavit* must be considered by the court unless "it presents sham factual issue." *Franks v. Nimmo*, 796 F.2d 1230, 1231. And when reviewing granting of summary judgment, pleadings and documentary evidence are to be construed liberally in favor of party opposing motion."

Instead, Judge Kelly alleged further technical errors in the language of the complaint. And the Tenth Circuit affirmed Judge Kelly's decision despite evidence of issues of material fact and the absence of any showing that the moving party was entitled to judgment as a matter of law. Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327, 1328-29 (9th Cir. 1983).

This conflicts with the U.S. Supreme Court, which has found that the "nonmoving party ... need only demonstrate the existence of a genuine issue of material fact in order to defeat a summary judgment motion." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In the third circuit, with *Lockhart v.* Hoenstine, 411 F.2d 455, 456, 458-459 (3rd Cir. 1969), the court found: "All doubts as to existence of a genuine issue to a material fact must be resolved *against* party moving for summary judgment in federal district court." And citing *Picking v. Penna, R. R. Co.*, 151 F.2d 240, 244 (3rd Cir. 1945), *Lockhart* further states: "Where plaintiff pleads pro se in suit for protection of civil rights, court should endeavor to construe plaintiff's pleadings without regard for technicalities," citing Picking v. Penna, R. R. Co., 151 F.2d 240, 244 (3 Cir. 1945).

Despite these established standards, and the existence of genuine issues of material fact, the Tenth Circuit in its April 10, 2002 order at 2, 6 and 7, said that Williams had failed to present any evidence.

But Williams produced extensive evidence, much of which was from the magistrate courts and none of which was challenged by the defendants.

Williams also disputed the allegations and affidavits of the defendants in her later-verified motions in opposition, her Motion for Reconsideration with three accompanying affidavits and her appeal pleadings before the Tenth Circuit. This disagreement was acknowledged by Judge Kelly in his March 22, 2001 order at 13, when he states "they (the

defendants) have come forward with affidavits that tell a largely different story than the one told by the plaintiff and provide different explanations for what occurred." This should mandate further action at the trial level, or at least limited formal discovery. At issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." And, whether "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243, 248, 251-252 (1986).

Judge Kelly himself acknowledged the sufficiency of some of Williams's exhibits, despite denials by the defendants as to the facts, in his March 22, 2001 order. For example, at 5, he agrees with Williams that she appeared without counsel at a show-cause hearing on July 11, 1997, and as follows:

> "although the harassment and stalking charges contained in the second complaint had been dismissed, she was sentenced on those charges to ninety days, five of which she served with the remainder suspended. Plaintiff later requested and received a copy of the judgment and sentence, and with the assistance of any attorney, had it overturned in September 1997."

Federal law has clearly established, as have New Mexico statutes, that "criminal sentence permitted only upon conviction." NMSA. 1978 § 30-1-11 states as follows:

> "No person indicted or charged by information or complaint of any crime shall be sentence therefore, unless he has been legally convicted of the crime in a court having competent jurisdiction of the cause and of the person. No person shall be convicted of a crime

unless found guilty by the verdict of the jury, accepted and recorded by the court; or upon the defendant's confession of guilt or a plea of nolo contendere, accepted and recorded in open court; or after trial to the court without jury and the finding by the court that such defendant is guilty of the crime for which he is charged."

And the U.S. Supreme Court has made it clear that absent a "knowing or intelligent waiver," no defendant may be sent to jail without legal representation. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). It is clear from the transcript of the trial attached as an exhibit to the Motion for Reconsideration that Williams did not knowingly waive representation; she didn't even know why she had received a notice because it was prepared by Defendant Lisa Waggoner in an incorrect format, when state statutes mandate it state the alleged reason for the order to show cause's issuance.

Giving the sufficiency of Williams's allegations further credence, in his previous order of August 1, 2000, Judge Kelly declined to dismiss the majority of Williams's amended complaint stating that "the court takes all *well-pleaded* allegations contained in complaint as true," citing *Sutton v. United Airlines*, 527 U.S. 471, 475 (1999) and such "*well-pleaded factual allegations* are construed in the light most favorable to the Plaintiffs," citing *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 619 (10th Cir. 1998).

Moreover, this Court has decided that claims should not be dismissed lightly. "In appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v.* Gibson, 355 U.S. 41, 45-46 (1957).

Williams, using the best available evidence without formal discovery, also showed that "the defendants did the deeds alleged ... precisely the question for trial." Elliott v. Thomas, 937 F.2d at 341. put in full citation.

Summary judgment is considered proper only "when no issue of material fact exists and the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrell, 477 U.S. 317, 322-33. The purpose of summary judgment is to "dispose of factually unsupported claims or defenses ...". Williams's claims were supported and, if limited discovery, had been granted, would have been more heavily buttressed.

In her Initial Disclosures etc., Williams named seventy-nine (79) documents and things, and attached many of these as exhibits to her motions in opposition, including but not limited to the following: a police report regarding Defendant Arley Sanchez, in which Williams was the complainant; an affidavit for Williams's arrest with a no-bond warrant issued two days after Williams filed charges against Defendant Arley Sanchez; a copy of the police report and affidavit of arrest showing perjury; a DMV/Record report from the Valencia County Sheriff's Office showing Williams's old address (but they used Williams's then-current address on the no-bond warrant); an illegal notice to show cause, not in the format required by state law, along with a letter to the judge from Defendant Agent John Mallory asking that Williams be held on no-bond until a psychological evaluation could be performed and stating that Williams should be made into an example; a Motion to Remove Sentence and Expunge Record and an order granting this arising from that illegal show cause hearing on July 11, 1997 in Valencia County's Los Lunas Magistrate Court, a bench warrant issued from Valencia County's Belen Magistrate Court for failure to appear after Williams's old address was given to the state police by Valencia County

Sheriff's Department records clerk, Defendant Debra Mallory, wife of Defendant Captain Wes Mallory and stepmother of Defendant Agent John Mallory; a hearing notice for Williams's motion to quash bench warrant and the order that she was required to sign granting a six-month extension to the prosecution before it could be quashed NOTE: *With his affidavit state police Defendant Audi Miranda included a falsified court pleadings in conjunction with Belen Magistrate Court clerk Brenda Gallegos, a forged order alleging Williams's bench warrant was quashed February 1999, when Williams bench warrant wasn't quashed until March 18, 1999, and then only after a hearing and a waiver of the six-month rule;* sundry court records, letters to Defendant Valencia County Commissioners and others about jail conditions. Tapes, not used as exhibits, although they were given to opposing counsel, except for one which needed enhancement, from Williams's former attorney Vera Ockenfels. Opposing counsel received tapes recordings of Ockenfels's paralegal telling Williams that the state police "refused to quash the warrant," and earlier messages from a Los Lunas Magistrate Court case, where attorney Rosie Allred told Williams that "they were going to drop the stalking charge anyway;" among others.

Williams did not attach as an exhibit, until she filed her Motion for Reconsideration, a transcript of the July 11, 1997 hearing, proving that she didn't know what the hearing was about, didn't knowingly waive counsel, and that she was prosecuted by Defendant Agent John Mallory on dismissed charges and sentenced on those charges without a plea of guilty or no contest (she'd plead innocent) and without a trial. In his March 22, 2001 order, Judge Kelly said that Williams needed to provide a copy of the tape or a transcript of the 1997 unconstitutional trial to defeat Agent John Mallory's qualified immunity defense. Williams also provided with her Motion for Reconsideration other

exhibits, including excerpts from an unconstitutionally-ordered psychological evaluation in which Williams was found to be mentally healthy and assertive. This evaluation, supposedly a confidential report, was put in a public file in violation of state statutes, making it accessible to opposing counsel. (Williams had it removed by court order). *This is indicative of how the state of New Mexico behaves and retaliates when its been sued.* Another example is Williams's traffic stop, without probable cause, by the state police less than two weeks after the Tenth Circuit upheld the dismissal of *Williams v. Valencia County et al.* That case was dismissed after the officer did not attend a pretrial conference or respond to motions for production (traffic tapes) and after Williams told the judge that it was a retaliatory traffic stop without probable cause. Several days before the case was dismissed, Williams was assaulted, hit twice in the head while she sat in her car by a stranger who thought Williams was blocking her car. After the Albuquerque Police refused to take action or interview witnesses, Williams filed an Internal Affairs complaint, which is pending. Williams also has noticed that she has been followed to various places, including to work, by a man who has told her that he's a private investigator.

In addition to the evidence provided with her motions in opposition, with her appeals pleadings, Williams corrected the accidental omission of her car registration, proving that her car was registered in 1997 to the correct address, contraverting Audi Miranda's affidavit where he could not access her correct address from the Department of Vehicles Record. With her previous exhibits in opposition, Williams had shown that Miranda was deliberately given the wrong address by the VCSO. In answer to Williams's challenge in the appellate court, he could not produce a copy of a motor vehicle record that he had run on Williams.

Despite this evidence, mainly taken from court records, and none of which was disputed by the defendants, the Tenth Circuit affirmed Judge Kelly's decision. In its order at 6-8, it stated that the plaintiff hadn't provided evidence or contraverted the defendants' evidence.

In order to fulfill their burden when requesting summary judgment, the defendants have to show "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. at 325. In fact, with the exception of a report written by Defendant Stephen Scharon, a former Attorney General's Office investigator who Williams met with to complain about the Valencia County defendants who took no action, there was little in the way of alleged evidence that hadn't been provided to the defendants' counsel by Williams with her disclosures.

The U.S. Supreme Court has determined that when a party moves for summary judgment they need to "show the absence of a genuine issue as to any material fact ...". And when the moving party fails to meet this burden, "petitioner was not required to come forward with suitable opposing affidavits under Fed. R. Civ. P. 56(e)." *Adickes v. Kress & Co.*, 398 U.S. 144, 145, 157.

III. THE DECISION OF THE TENTH CIRCUIT THAT A PRO SE LITIGANT'S CORRECTION OF A TECHNICAL ERROR BY THE SUBMISSION OF AFFIDAVITS WAS NOT ADEQUATE TO REINSTATE THE CASE, DUE TO OTHER ALLEGED TECHNICAL ERRORS, CONFLICTS WITH THE U.S. SUPREME COURT IN KAUFFMAN V. MOSS, 420 F.2D 1270; GOMEZ V. TOLEDO 446 U.S. 635 (1980).

In his May 30, 2001 order at 5, denying Motion for Reconsideration, with its three accompanying affidavits, Judge Kelly stated Williams's submissions did not "cure the legal deficiencies in her case" making it "unfair to require the various Defendants to repeat their efforts with new submissions." Judge Kelly neglects to mention that they would not have to resubmit their affidavits, he is only being asked to review pleadings in light of Williams's affidavits, and find for Williams, denying qualified immunity, absolute immunity, summary judgment and dismissal.

In his previous order of March 22, 2001 at 15, granting summary judgment and dismissal (possible due to the absence of affidavits by Williams, although other courts have required notice of affidavit requirements), Judge Kelly said that Williams had failed to define the specific constitutional rights at issue, as follows: "It is not enough for Plaintiff to merely state that her Fifth, Sixth and Fourteenth Amendment rights, her due process rights, or her rights to be free of § 1983 conspiracy have been violated, or that she has been maliciously prosecuted, falsely arrested, falsely imprisoned, or deprived of liberty without due process of law. Rather, the Plaintiff must be specific with reference to the circumstances facing the Defendants and the applicable law."

Williams's complaint and pleading were not non-conclusory. They were specific. Within her complaint, Williams gave a chronological listing of events and the participation of the defendants, providing extensive detail. Each count referred to violations of state and federal tort and/or the constitution, its amendments, and § 1983. And it set forth fact "in manner which, taken pleaded facts as true, states claim as matter of law." This satisfies the less stringent requirements for pro se pleadings. *Johnson v. Stuart*, 71 F.2D 1550 (CA8 Iowa 1983). Williams also explained the facts upon which she based her allegations of unconstitutional

activity and intent. This is sufficient for a complaint. *In Re World of Wonder Securities*, 694 F. Supp. 1427 (N.D. Cal. 1988). (Appendix Exhibit A and B).

Under the criteria of the Federal Rules of Civil Procedure and the rulings of other courts, Williams's complaint is sufficient, and she did not fail to adequately state her claims. *Refer to Appendix Exhibits A & B for excerpts.*

Federal rules do not require detail, only a plain statement. And Fed. R. Civ. P. 8(f) states that: "All pleadings should be construed as to do substantial justice."

The Tenth Circuit and Judge Kelly have departed in *Williams v. Valencia County Sheriff's Office et al.* with the U.S. Supreme Court.

"All the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. [Footnoting Rule 8(a)(2).] Conley v. Gibson. 355 U.S. 41, 45-48.

Conley cited another case for support, Dioguardi v. Durning, 139 F.2d 774 (CA2 1944). Dioguardi states that "there is no pleading requirement of stating facts sufficient to constitute a cause of action, but only a short and plain statement of the claim ..., referring to Fed. R. Civ. P. ".

The U.S. Supreme Court has decided against a higher standard for § 1983. "Federal court may not apply heightened pleadings standard in civil rights cases ... requiring that complaints under § 1983 state with factual detail and particularity basis for claim could not be reconciled with liberal system of notice pleading set up by Federal Rules ..." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

But the Tenth Circuit did not follow this criteria. Despite the detailed allegations and claims made by Williams, it stated as follows in its order at 7: "Based upon our review of the record, we agree with the district court that many of the

plaintiff's claims against these defendants fail to state a constitutional claim ...".

Moreover, dismissing a case on this basis, without identifying exactly what the alleged deficiencies are and allowing them to be corrected when the plaintiff is acting pro se, has been rejected by other courts. (Judge Kelly did not explain this alleged deficiency, nor did opposing counsel, until the order disposing of the case.)

"Where court did not advise prisoner in what respects second amended complaint was deficient ... and where it was not absolutely clear that prisoner could not amend complaint to allege constitutional violations," dismissal was not proper. *Noll v. Carlson*, 809 F.2d 1446 (CA9 Cal, 1987).

Crawford-El v. Britton, 523 U.S. 574, 597-600 (1998) stated that if a *pro se* prisoner's allegations weren't sufficient to avoid dismissal, he should be allowed to replea.

As to the sufficiency of Williams's complaint, this Court is asked to review the excerpts in Appendix Exhibit A and B, which show that Williams's was detailed, factual, and made clear reference to statutory and federal laws, primarily § 1983. Williams cited the laws and claims for each count. Her only possible error may have been, in some instances, alleging the constitutional claim in the heading of each count, but not referring to the amendment or law within the text. Williams proved her evidence and her allegations were supported, not unsupported and conclusory, as described by the Tenth Circuit at 6.

"In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The Tenth Circuit itself has determined that that qualified immunity is not warranted when "there are material issues of fact in dispute. And, it held that "factual questions as to whether officer had probable cause to arrest referee precluded summary judgment on grounds of qualified immunity." *Guffey v. Wyatt*, 18 F.3d 869, 873 (10th Cir, 1994). And in the ninth circuit, as well as other courts, if a warrant makes false statements or omits key information, acting with "deliberate or reckless regard for the truth," that warrant is "insufficient to establish probable cause when officer asks for qualified immunity." *Hervey v. Estes*, 65 F.3d 784, 789 (9th Cir 1995).

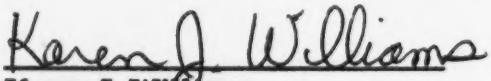
In upholding Judge Kelly's decision, the Tenth Circuit granted identical immunities to the defendants. But for the defendants to prove entitlement to qualified immunity, while performing discretionary duties, they would have had to prove their actions were reasonable. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 801, 814, 819.

The U.S. Supreme Court and other courts have not supported the requirement required by Judge Kelly. "In order to state cause of action under 42 U.S.C.A § 1983, plaintiff must allege only that some person has deprived him of federal rights and that such person acted under color of state or territorial law ...". Gomez v. Toledo, 446 U.S. 635 (1980). The U.S. Supreme Court also held that there are only two elements required in a viable cause of action: first, the plaintiff states she was deprived of a federal right, and secondly, the person depriving her of that right was acting under color of state law. Id. at 640.

WHEREFORE, Williams respectfully requests the Court grant her writ, so that she can file a brief, and hopefully obtain relief and have her case reinstated.

WHEREFORE, the Court is asked to take action, safeguarding the rights of *pro se* litigants in § 1983 actions.

RESPECTFULLY SUBMITTED:



Karen J. Williams
***Pro Se* Petitioner**

APPENDIX OF ORDERS

PETITION FOR PANEL REHEARING DENIED ON APRIL 26, 2002 BEFORE HENRY, ANDERSON, AND LUCERO, CIRCUIT JUDGES S/DEPUTY CLERK

ORDER
Filed April 26, 2002

Before **HENRY, ANDERSON,** and **LUCERO,** Circuit Judges.

Appellant's petition for panel rehearing is denied.

s/Entered for the Court, Patrick Fisher, Clerk of the Court by Deputy Clerk

United States Court of Appeals
For the Tenth Circuit

Filed
United States Court of Appeals
Tenth Circuit

APR 10 2002

PATRICK FISHER
Clerk

KAREN J. WILLIAMS,
Plaintiff-Appellant,

v.

No. 01-2131

(D.C. No. CIV-00-0240 PJK/LFG)

(D. New Mexico)

VALENCIA COUNTY SHERIFF'S OFFICE (VCSO); JOHN MALLORY, Also known as U.S. Department of Drug Enforcement Officer, Detective; JUAN JULIAN, Sheriff; D.C. Jackson, Undersheriff; ARLEY SANCHEZ, a private individual; VALENCIA COUNTY Deputy Clerk SHERIFF'S OFFICE CIVILIAN EMPLOYEES; DEBRA MALLORY; DONNA WARDLOW, CONNIE CARTER; ANNA MARQUEZ; LOS LUNAS MAGISTRATE COURT CLERKS; CARLA GONZALES; LISA WAGGONER; TERESA CHAVEZ; BELEN MAGISTRATE COURT CLERKS; BRENDA GALLEGOS; J. SANCHEZ; VALENCIA COUNTY COMMISSION; AUDI MIRADA, State Police Officer; STEVE SHARON, Attorney General's Office

Investigator; STATE OF NEW MEXICO; N.M. ATTORNEY GENERAL'S OFFICE; N.M. DEPARTMENT OF PUBLIC SAFETY; DRUG ENFORCEMENT AGENCY; WES MALLORY, Captain,

Defendants - Appellees.

ORDER AND JUDGMENT

BEFORE HENRY, ANDERSON, AND LUCERO, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Karen J. Williams, appearing *pro se*, appeals the district court's dismissal of her 42 U.S.C. § 1983 complaint against numerous New Mexico state and county agencies and officials, in their official and individual capacities, and other defendants. The parties are familiar with the facts of this case, which are accurately and thoroughly set forth in the district court's orders of dismissal. Thus, we will not repeat them here. Because the magistrate judge and district court did not abuse their discretion in denying plaintiff further discovery and because plaintiff failed to present any evidence demonstrating that any of the defendants violated her constitutional rights, we affirm.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3

We review plaintiff's challenges to the district court's and magistrate judge's discovery rulings for an abuse of discretion. *Soma Med. Int'l Standard Charter Bank*, 196 F.3d 1292, 1300 (10th Cir. 1999). We review a grant of summary judgment *de novo*, applying the same standards as the district court. *Thomas v. IBM*, 48 F.3d 478, 484 (10th Cir. 1995); *see also DeSpain v. Uphoff*, 264 F.3d 965, 971 (10th Cir. 2001) ("We review the legal issues surrounding the grant of qualified immunity de novo.") "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party." *Id.* (quoting Fed. R. Civ. P. 56(c)).

Discovery Issues

After the district court dismissed several defendants because the claims against them were barred by sovereign, qualified and absolute immunity, the magistrate judge stayed further discovery because the remaining defendants advised the court that they would soon be filing motions to dismiss or for summary judgment based on qualified immunity. *See Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992) (holding that when qualified immunity defense raised, the district court should stay discovery until the

immunity issue is resolved). The district court and magistrate judge informed plaintiff on at least three occasions that if she believed additional discovery was needed, she needed to file an affidavit pursuant to Fed. R. Civ. P. 56(f) seeking authorization to conduct discovery. The defendants moved for summary judgment, which was granted by the district court."

Plaintiff first argues the district court erred in considering defendants' motion for summary judgment because no date was set for filing such motions in the initial pretrial report. This argument lacks merit because Fed. R. Civ. P. 56(b) expressly permits defendants to move for a summary judgment at any time.

Plaintiff next argues that the district court erred in considering defendants' motions to dismiss and for summary judgment before she had an opportunity to complete discovery. There is no requirement that discovery be completed before a district court awards summary judgment. *See Weir v. Anaconda Co.*, 773 F.2d 1073, 1081 (10th Cir. 1985). As the district court and magistrate judge informed plaintiff, if a party requires additional discovery to respond to a summary judgment motion, that party must file an affidavit pursuant to Rule 56(f). *See Id.* at 1082. Plaintiff did not file such an affidavit. "Where a party opposing summary judgment and seeking a continuance pending completion of discovery fails to take advantage of the shelter provided by Rule 56(f) by filing an affidavit, there is no abuse of discretion in granting summary judgment if it is otherwise appropriate." *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 832-33 (10th Cir. 1986). Thus, the district court did not abuse its discretion in not allowing further discovery before ruling on the motions to dismiss and for summary judgment.

Following the grant of summary judgment, plaintiff filed a motion for reconsideration under Fed. R. Civ. 59(e) and 60(b), claiming she had been unaware she was required to file a Rule 56(f) affidavit in order to obtain further discovery. She contends the district court erred in denying this motion. Plaintiff failed to demonstrate any manifest error of law warranting relief under Rule 59(e) and failed to meet the threshold requirements for relief under Rule 60(b). Her assertion she was unaware she need to file a Rule 56(f) motion is belied by the record. As noted above, the magistrate judge clearly informed plaintiff of the required procedure for obtaining additional discovery at the Rule 16 conference, including the requirement that she file a Rule 56(f) affidavit, and this information was repeated to plaintiff in at least two written orders entered prior to the summary judgment order. Plaintiff's *pro se* status does not excuse her obligation to comply with the fundamental requirements of the Federal Rules of Civil Procedure and the explicit orders of the magistrate judge and district court. *See Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994). The district court did not abuse its discretion in denying plaintiff's motion.

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Liability Issues

Plaintiff contends the district court erred in dismissing her claims against the defendants. We have carefully reviewed plaintiff's complaint and pleadings, as well as the entire record on appeal. We agree that plaintiff failed to present any evidence demonstrating that any of the defendants violated her constitutional rights. In many of

plaintiff's allegations of error, she asserts that genuine issues of fact precluded summary judgment because the evidence presented by the defendants was at odds with her allegations of wrongdoing. However, she presented only unsupported and conclusory allegations, which do not create an issue of fact. *See Matthiesen v. Banc One Mortgage Corp.*, 173 F.3d 1242, 1247 (10th Cir. 1999). Where the nonmovant will bear the burden of proof at trial on a dispositive issue, "that party must go beyond the pleadings and designate specific fact so as to make a showing sufficient to establish the existence of an element essential to that party's case in order to survive summary judgment." *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1128 (10th Cir. 1`998) (quotation marks omitted).

We conclude that the district court correctly ruled that plaintiff's allegations against the county clerk defendants involved actions for which the are entitled to absolute quasi-judicial immunity. *See Whitesel v. Sengenberger*, 222 F.3d 861, 869 (10th Cir. 2000) (holding that non-judicial officers performing

discretionary or ministerial acts are entitled to absolute quasi-judicial immunity). With respect to plaintiff's claims that these clerks falsified or destroyed records and altered tapes of the hearings, the district court correctly ruled that plaintiff failed to present any evidence in support of her allegations and failed to controvert the clerks' affidavits denying her allegations.

We also conclude that the district court correctly dismissed plaintiff's individual capacity claims against defendant Steve Sharon (sic), an investigator with the New

Mexico Attorney General's Office. Her allegation that he was grossly negligent in investigating her complaints is insufficient to establish a constitutional violation. *See Romero v. Fay*, 45 F.3d 1472, 1478 (10th Cir. 1995) (holding that allegations of police officer's negligent investigation do not state a cognizable § 1983 action).

The district court correctly dismissed plaintiff's claims against Audi Miranda, a New Mexico state police officer, and John Mallory, a police officer with the Valencia County Sheriff's Office at the time of the events in question. Based upon our review of the record, we agree with the district court that many of the plaintiff's claims against these defendants fail to state a constitutional claim. We also agree with the district court that plaintiff failed to present any evidence in support of her allegations against these defendants and failed to controvert the evidence presented by the defendants refuting her allegations. Therefore, no

competent summary judgment supported a claim that these defendants violated her constitutional rights. The district court correctly dismissed claims against Mr. Mallory's supervisors, Wes Mallory, D.C. Jackson, and Juan Julian, because there was no basis for any derivative supervisory liability against these individuals and no competent summary judgment evidence supported a claim that any of these defendants took any deliberate action or had any actual knowledge of any constitutional violation.

The district court correctly ruled that no detailed, non-conclusory allegations in the complaint, nor any competent summary judgment evidence supported a claim that a custom or policy of Valencia County, the Valencia

County Commission or its Commissioners directly caused any violation of plaintiff's constitutional rights. Plaintiff also makes a very general claim that the district court erred in granting qualified immunity to the remaining defendants. Plaintiff fails to identify which defendants she is characterizing as "remaining" or to point to any error in the district court's analysis or conclusions. This we do not address this general contention. *See Murrell v. Shalala*, 43 F.3d 1388, 1389 N.2 (10th Cir. 1994) (noting that perfunctory complaints which fail to frame and develop an issue are insufficient to invoke appellate review).

We AFFIRM for substantially the same reasons set forth in the thorough orders entered by the district court. The mandate shall issue forthwith.

Entered for the Court

Robert H. Henry
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

KAREN J. WILLIAMS,
Plaintiff,

v.

No. 00-0240 PK/LFG

VALENCIA COUNTY SHERIFF'S OFFICE ("VCSO"); ET AL.
Defendants.

ORDER

THIS MATTER comes on for consideration of Plaintiff's Motion for Extension of Time to File Motion for Reconsideration filed April 6, 2001 (Doc. 132), and the Motion for Reconsideration or to Hold in Abeyance, and/or Relief from Order Under Rule 60(b) filed April 6, 2001 (Doc. 134) together with a series of supporting affidavits (*Docs. 135-137). Upon consideration whereof,

(1) Final judgment in this matter was entered on march 23, 2001 (Doc. 130). Plaintiff filed her motion for reconsideration and/or relief pursuant to Fed. R. Civl. P. 60(b) (Doc. 134) at the same time she sought an extension of time in which to file (Doc. 132). The motion for

reconsideration and/or relief pursuant to Fed. R. Civ. P. 60(b) was filed within ten days of the date of entry of the judgment. See Fed. R. Civ. P. 6(a); Fed. R. App. P. 4(a)(4)(iv) & (vi)[1]. Thus, to the extent that Plaintiff sought to file her material within ten days from the date of entry of judgment, an extension of time is unnecessary.

(2) Plaintiff seeks relief on the basis of mistake, inadvertence and

Footnote: [1] Plaintiff also filed a premature notice of appeal on April 20, 2001 (Doc. 133). The Tenth Circuit has "abated[d] proceedings on appeal pending notification that the district court has entered an order disposing of the timely Rule 60 motion." Williams v. Valencia County Sheriff's Office, No. 01-2131, Order at 1 (10th Cir. May 15, 2001).

excusable neglect. Doc. 134 at 2. It appears she is moving under Red. R. Civ. P. 60(b)(1), which is exclusive of Rule 60(b)(6). Pioneer Inv. Servs. Co. V. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 393 (1993); Plotner v. AT&T Corp., 224 F.3d 1161, 1174 (10th Cir. 2000). In these circumstances, a Rule 60(b)(1) motion might afford reconsideration where (1) a party has made an excusable litigation mistake, or (2) the court has made a substantive mistake of law or fact in the final judgment. Yapp v. Excel Corp., 186 F.3d 1222, 1231 (10th Cir. 1999).

(3) It appears that Plaintiff also is seeking reconsideration under Fed. R. Civ. P. 59(e). Doc. 142 at 3. A Rule 59(e) motion is intended to allow a district court to correct mistakes immediately after judgment. White v. New Hampshire Dep't of Employment Security, 455 U.S. 445, 450

(1982). Appropriate grounds for such a motion, often styled as a motion to reconsider, include "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." Servants of the Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000); see also Van Skiver v. United States, 952 F.2d 1241, 1244 (10th Cir. 1991).

The basis of Plaintiff's motion is that (1) she was unable to obtain discovery because the case had been placed upon an administrative track; (2) she was unaware of the need for a Fed. R. Civ. P. 56(f) affidavit to obtain discovery; (3) she was unaware of the necessity of the evidentiary materials, Fed. R. Civ. P. (4) she was unaware that she could not rest upon her pleadings, Fed. R. Civ. P. 56(e); and (5) she could not have obtained affidavits in a timely fashion because many witnesses will have to be subpoened. (6) Plaintiff's grounds are not persuasive considering the history of the discovery issue in these proceedings. That history is discussed in the memorandum opinion and order which led to the judgment, Doc. 129 at 9-11. Suffice it to say that the magistrate judge informed Plaintiff of the Rule 56(f) procedure both orally and in writing. Doc. 86 at 6; Doc. 69 at 2. She appealed the magistrate's limitations on discovery, and those limitations were upheld. Doc. 74 at 4. In her pleadings prior to judgment, she alluded to filing a motion or affidavit for complete discovery, Doc. 84 at 7; Doc. 106 at 7, but did not. Insofar as being unaware of the need to file affidavits, Plaintiff cited the local and federal rules, as well as case law that plainly alert the reader that summary judgment requires an evidentiary response. Doc. 129 at 13 n.2. Even though Plaintiff is pro se, she still must comply with the rules including those attendant to summary judgment. Creative Gifts, Inc. v. UFO, 235 F.3d 540, 549 (10th Cir. 2000); Ogden v. San Juan County, 32 F.3ds 452, 455 (10th Cir. 1994); Nielsen v. Price, 17 F.3d 1276, 1277 (10th Cir. 1994). "[A]

party who simply misunderstands or fails to predict the legal consequences of [her] deliberate acts cannot later, once the lesson is learned, turn back the clock to undo those mistakes." Yapp, 186 F.3d at 1231. None of the grounds in Fed. R. Civ. P.

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60(b) or 59(e) warrant relief from judgment. Moreover, while Plaintiff's submissions do not cure the legal deficiencies in her case, it would be patently unfair to require the various Defendants to repeat their efforts with new submissions.

NOW, THEREFORE, IT IS ORDER, ADJUDGED and DECREED that Plaintiff's Motion for Extension of Time to File Motion for Reconsideration filed April 6, 2001 (Doc. 132), is denied as moot.

IT IS FURTHER, ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for Reconsideration or to Hold in Abeyance, and/or Relief from Order Under Rule 60(b) filed April 6, 2001 (Doc. 134) is denied.

DATED this 30th day of May 2001, at Santa Fe, New Mexico.

s/Paul Kelly Jr.
United States Circuit Judge
Sitting by Designation

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The Petitioner respectfully requests that the Court note that due to cost considerations, the 29-page MEMORANDUM OPINION AND ORDER by Circuit Judge Paul Kelly Jr. granting various Defendants' motions to dismiss and/or for summary judgment (docs. 91, 92, 102 & 104) on all federal claims; state law claims will be dismissed without prejudice, filed March 22, 2001 at 11:09 a.m. by Robert March, clerk in the United States District Court, Albuquerque, New Mexico, is not reproduced herein, however, ten (10) copies have been included with this petition.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

KAREN J. WILLIAMS,

Plaintiff,

Vs. No. 00-0240 PK/LFG

VALENCIA COUNTY SHERIFF'S OFFICE ("VCSO") DETECTIVE (AGENT) JOHN MALLORY, aka U.S. Department of Drug Enforcement Officer; CAPTAIN WES MALLORY, SHERIFF JUAN JULIAN; UNDERSHERIFF DJ JACKSON; ARLEY SANCHEZ, a private individual, Valencia County Sheriff's Office Civilian Employees DEBRA MALLORY; DONNA WARDLOW; CONNIE CARTER; ANNA MARQUEZ; and REAL NAME UNKNOWN DISPATCHERS(S); Los Lunas Magistrate Court Clerks CARLA GONZALES; LISA WAGONER;(sic) WAGGONER and TERESA CHAVEZ; Been (sic) Belen Magistrate Court ClerKs BRENDA GALLEON (sic) GALLEGOS; J. SANCHEZ; and REAL NAME(S) UNKNOWN CLERKS; VALENCIA COUNTY COMMISSION AND ITS COMMISSIONERS FROM 1997 TO PRESENT; STATE POLICE OFFICER AUDI MIRANDA; N.M. ATTORNEY

GENERAL'S OFFICE
INVESTIGATOR STEVE SHARON (sic)
SCHARON; STATE OF NEW MEXICO; N.M.
ATTORNEY GENERAL'S OFFICE;
N.M. DEPARTMENT OF PUBLIC
SAFETY; U.S. DEPARTMENT OF
DRUG ENFORCEMENT ADMIN.,
Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes on for consideration of Defendants Steve Scharon, Carla Gonzales, Lisa (Waggoner) Mattox and Teresa Chavez' Motion to Dismiss and/or for Summary Judgment filed October 19, 2000 (doc. 92); Defendants Audi Miranda, Joanne Sanchez and Brenda Gallegos' Motion to Dismiss and/or for Summary Judgment filed October 19, 2000 (doc. 91); the Motion to Dismiss on behalf of Defendant Valencia County Sheriff's Department, Deputy John Mallory, Captain Wes Mallory, Sheriff Juan Julian, Undersheriff D.C. Jackson, Debra Mallory, Donna Wardlow, Connie Carter, Anna Marquez, and Valencia County Commission ("the Valencia County Defendants") filed October 20, 2000 (doc. 104), and the Motion for Summary Judgment on behalf of the Valencia County Defendants filed October 20, 2000 (doc. 102). The court finds that the motions are well taken insofar as judgment is warranted in favor of the moving Defendants on the federal claims; the court declines to exercise supplemental jurisdiction over the state law claims and will dismiss them without prejudice.

Background

This is a federal civil rights action seeking compensatory and punitive damages against various officials pursuant to 42 U.S.C. §§ 1983, 1985 and 1986. Plaintiff also asserts several state law claims. Between the unverified first

amended complaint, the initial pretrial report, and the pleadings, the following facts emerge concerning the federal claims.

Plaintiff alleges that in mid-1996 the Valencia County Sheriff's Department (VCSO) began a long-term policy of maliciously prosecuting her, although she was living in California. She contends that Defendant John Mallory, a VCSO detective who was cross-deputized as a DEA agent, investigated and prosecuted her on behalf of Defendant Arley Sanchez, a Valencia County resident and former coworker of the Plaintiff. Defendant Arley Sanchez complained to Defendant John Mallory that Plaintiff engaged in telephone harassment and provided audiotape to substantiate his claims.

A. First Complaint.

Upon her return to New Mexico, Plaintiff was charged in Los Lunas Magistrate Court (No. 14-3-97-1305-M) in a November 1996 complaint with telephone harassment and assault. In early 1997, those charges were dismissed without prejudice. She contends that Defendant John Mallory was without jurisdiction to conduct an investigation in California, and that the charges were based on false information.

B. Second Complaint.

In February 1997, Plaintiff was charged in the Los Lunas Magistrate Court (No. M-59-MR9610165) in a second complaint with telephone harassment and stalking. She was arrested and confined without bond, at least temporarily. The

charges were later dismissed without prejudice pursuant to a stipulated agreement. She claims that Defendant John Mallory is responsible for malicious prosecution, false arrest and false imprisonment in connection with the arrest on this second complaint, and that he committed perjury and conspired with other Defendants, including various supervisory personnel, in prosecuting her. The charges were dismissed pursuant to a stipulated order of dismissal with the condition that Plaintiff cease contacting Defendant Arley Sanchez and Defendant John Mallory.

Plaintiff contacted the media and Defendant Scharon, an investigator with the New Mexico Attorney General's office, to complain. Plaintiff contends that Defendant Scharon negligently investigated her complaint, finding no basis for it. According to the Plaintiff, she changed her mind about the stipulated order of dismissal and wanted to go to trial. Contrary to the stipulated order, she attempted to contact Defendant John Mallory. As Defendant John Mallory was now part of a drug task force, Plaintiff left numerous messages with VCSO dispatchers that she wanted a trial.

On June 27, 1997, Defendant John Mallory faxed a letter to the magistrate judge informing him that Plaintiff had violated the conditions of the stipulated order based upon her repeated attempts to contact him and further contact with Defendant Arley Sanchez. Defendant John Mallory requested Plaintiff be arrested, and that she be detained for a psychological evaluation. The judge

calendared the matter for a show-cause hearing on July 11, 1997.

Plaintiff appeared at the hearing before the Los Lunas Magistrate Court without counsel because her previous counsel had withdrawn. The judge found Plaintiff in violation of the stipulated order of dismissal entered on the second complaint. Although the harassment and stalking charges contained in the second complaint had been dismissed, she was sentenced on those charges to ninety days, five of which she served with the remainder suspended. Plaintiff later requested and received a copy of the judgment and sentence, and with the assistance of an attorney, had it overturned in September 1997.

According to Plaintiff, what occurred on July 11, 1997, was possible because Defendant John Mallory committed perjury and conspired with Defendant Arley Sanchez and others to commit perjury and imprison the Plaintiff without due process of law. She also claims that various Defendants, including the Los Lunas court clerk Defendants, destroyed records, including those of her prior arraignment, and prevented her from obtaining counsel. She also claims that she did not receive proper notice of the hearing, was not advised of her right to appeal or given a copy of the judgment, and that the tape of the hearing was altered.

C. Third Complaint.

In January 1998, Defendant Miranda, a state police officer, filed a complaint against Plaintiff in the Belen Magistrate Court (No. M-60-MR-

9800009) based upon the statements of Defendant Debra Mallory and Connie Carter, VCSO employees, that Plaintiff was engaging in telephone harassment. Plaintiff contends that VCSO Defendants Debra Mallory, Carter, Wardlaw and Marquez made false statements about her. The address used for the third complaint was out of date; a bench warrant was issued for Plaintiff's arrest when she failed to appear at arraignment. Plaintiff contends that various Defendants, including the Belen court clerk Defendants, conspired to use the wrong address.

Ultimately, an order quashing the bench warrant was filed pursuant to an agreement. Plaintiff contends that while this agreement was being negotiated, Defendant Miranda threatened her through her attorney. Plaintiff was not present during these negotiations at her attorney's direction, however. She contends that her presence was mandatory.

D. Federal Proceedings to Date.

The court has previous dismissed Defendant DEA (doc. 109) under Fed. R. Civ. P. 12(b)(1) and (b)(6). A Clerk's Entry of Default has been entered against Defendant Arley Sanchez. Doc. 112. All federal claims pursuant to §§ 1983, 1985 and 1986 against the State of New Mexico, the New Mexico Attorney General's Office, and the New Mexico Department of Public Safety were dismissed without prejudice. Doc. 47. All federal official capacity claims against the following individual Defendants were dismissed with prejudice: Los Lunas Magistrate Court Clerks Carla Gonzales, Lisa (Waggoner) Mattox, and

Teresa Chavez; Belen Magistrate Court Clerks Brenda Gallegos and J. (Joanne) Sanchez; New Mexico State Police

Officer Audi Miranda, and New Mexico Attorney General's Office Investigator Steve Scharon. Id. The court held that the court clerk defendants had absolute immunity on claims that they conspired to prevent Plaintiff's representation by counsel by failing to assign her an attorney and by allowing an attorney to withdraw. The court declined to grant absolute immunity to the court clerk defendants on six other claims.

Discussion

A. Summary Judgment Standard.

Because these motions will be decided with reference to matters outside the pleadings, the summary judgment standard applies.[1] Indeed, in responding to the motions, Plaintiff has submitted documentary evidence. Docs. 116, 117 & 119. Summary judgment is appropropriate when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A movant is responsible for identifying the basis of

[1] The Valencia County Defendants have moved to dismiss certain claims solely pursuant to Fed. R. Civ. P. 12(b)(6). Certain legal issues contained in the motion to dismiss overlap with (and are inextricably intertwined with) the qualified immunity analysis on which summary judgment was sought. Where the Valencia County Defendants have also moved for dismissal of certain claims as a matter of law and on grounds other than qualified immunity, the court has applied the standard in Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

its motion, which it may support with material demonstrating the absence of a genuine issue of material

fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Here, the moving Defendants rely upon affidavits and other documentary evidence in support of their motions for summary judgment.

Although Plaintiff's pleadings are entitled to liberal construction, Haines v. Kerner, 404 U.S. 519, 520-21 (1972), a *pro se* litigant is required to comply with established rules of procedure, Ogden v. San Juan County, 32 F.3d 452, 455 (10th Cir. 1994), including those attendant to summary judgment. In opposing a summary judgment motion, the non-movant may not rest upon her pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-movant is not required to produce evidence in a form admissible at trial, but must respond with material other than the pleadings themselves, i.e. depositions, answers to interrogatories, admissions on file and affidavits. Celotex, 477 U.S. at 324; Fed. R. Civ. P. 56(C). A court considers all evidence and reasonable inferences therefrom in the light most favorable to the non-movant; however, that material must contain probative evidence that would allow a trier of fact to find in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). Disputes about immaterial facts will not preclude summary judgment. Id. at 248.

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses ...." Celotex, 477 U.S.

at 323-24. Relying on D.N.M. LR-Civ. 56.1(a), which provides that motions for summary judgment must be filed within the deadline set by the initial pretrial report (IPTR), Plaintiff argues that the Valencia County Defendants' * motion for summary judgment should be denied because

the IPTR set no deadline. This argument is without merit—a motion for summary judgment by a defendant may be made be [sic] at any time. Fed. R. Civ. P. 56(b).

B. Plaintiff's Request for Additional Discovery.

Plaintiff requests full discovery so that she can "depose and or obtain affidavits from several witnesses." Doc. 117 at 16. A brief background is necessary. The magistrate judge required the parties to make or supplement their mandatory Fed. R. Civ. P. 26(a) disclosures within ten days after the Rule 16 conference, and ordered that each party produce various non-privileged tapes and documents. Doc. 69; see also Doc. 86. The magistrate judge stayed formal discovery and placed the case on an administrative track because the United States had filed a motion to dismiss, and other defendants indicated that motions based upon qualified immunity would be forthcoming. Id. Plaintiff objected to the magistrate ordering informal discovery and denying formal discovery; she also sought his disqualification. This court affirmed the magistrate judge's discovery rulings, finding them well

within his discretion particularly given the immunity defenses raised by several defendants. Doc. 74; see also Crawford-El v. Britton, 523 U.S. 574, 597-98 (1998) (court should exercise discretion to protect the substance of qualified immunity defense, i.e., freedom from unnecessary discovery or trial proceedings). This court referred the disqualification motion to the magistrate judge; although the magistrate judge found no basis for disqualification, he recused on the basis that Plaintiff might perceive his decisions as biased. The current magistrate judge denied

Plaintiff's subsequent motions to compel discovery, but required the Valencia County Defendants to provide transcripts of certain telephone calls made by the Plaintiff to Defendant Arley Sanchez.

Plaintiff's request for additional discovery is not well taken. Plaintiff has not filed the required affidavit pursuant to Rule 56(f), nor has she explained the facts she wants to discovery, why she has not discovered them and how additional time for discovery would assist her in defeating the motions. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 160-61 (1969); Price v. Western Resources, Inc., 232 F.3d 779, 783-84 (10th Cir. 2000). Although Plaintiff has specifically requested to depose various Defendants, unverified statements in briefs or memoranda do no fulfill the function of a Fed. R. Civ. P. 56(f) affidavit. Comm. for the First Amendment v. Campbell, 962 F.2d 1517, 1522 (10th Cir. 1992). Plaintiff twice indicated that she planned to file a "motion or affidavit" requesting complete discovery, Doc. 84 at 7; Doc. 106 at 7, but no affidavit, as required by Rule 56(f)

and explained to the Plaintiff by the magistrate, was filed.

C. Conceded Claims.

Plaintiff concedes that her claims under §§ 1985 and 1986 should be dismissed. She also agrees that the remaining § 1983 claims against the Defendant Valencia County Sheriff's Department should be dismissed. Thus, only federal claims under § 1983 against various individual Defendants and the Valencia County Commission remain.

D. Absolute Immunity.

The court clerk defendants (Los Lunas Magistrate Court Clerks Carla Gonzales, Lisa (Waggoner) Mattox, and Teresa Chavez; Belen Magistrate Court Clerks Brenda Gallegos and J. (Joanne) Sanchez) (sic) are entitled to absolute immunity on the claims asserted in the amended complaint based upon subsequent and controlling authority. In Whitesel v. Sengenberger, 222 F.3d 861, 869 (10th Cir. 2000) a Tenth Circuit panel interpreted the Circuit's case law as holding "that those performing ministerial acts at the direction of a judge are also entitled to absolute immunity." Although the court did not cite Antoine v. Byers & Anderson, Inc., 508 U.S. 429 (1993), the court noted the distinction between discretionary and ministerial acts within their court employment. In Whitesel, pretrial service officers that signed and delivered TROs pursuant to judicial directives were afforded absolute immunity, although the TROs were

invalid procedurally. The court noted that the judicial process is better served by allowing correction of such errors through the judicial process, as opposed to exposing judicial personnel to personal liability. Id. at 869-70. That same rationale applies here.

E. Qualified Immunity as to the Remaining Individual Defendants.

Government officials performing discretionary functions normally have qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Contrary to Plaintiff's contention, this case involves largely

discretionary functions--those requiring judgment and "inevitably are influenced by the decisionmaker's experience, values and emotions." Id. At 816. The first inquiry is whether a plaintiff has come forth with sufficient facts demonstating the violation of an actual constitutional rights. Wilson v. Layne, 526 U.S. 603, 609 (1999). If so, the next inquiry is whether that right was clearly established. Id. Clearly established law means Supreme Court or Tenth Circuit authority, or the clear weight of authority from other jurisdictions. Whitesel, 222 F.3d at 872. If both inquiries are resolved in favor of the Plaintiff, then the individual moving Defendants bear the burden of establishing no genuine issue of material fact and entitlement to judgment as a matter of law. Id.

In this case, the individual moving Defendants dispute the factual predicate

of Plaintiff's claims. They have come forward with affidavits that tell a largely different story than the one told by the Plaintiff and provide different explanations for what occurred. In response to this evidence, Plaintiff has failed to submit evidence indicative of a genuine issue of material fact for trail, i.e., evidence demonstrating the violation of a constitutional right.

In passing on a motion for summary judgment, a court is confined to evidence that could be reduced to admissible evidence at trial. Thomas v. Int'l Business Machines, 48 F.3d 478, 485 (10th Cir. 1995); World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1474 (10th Cir. 1985). By itself, the documentary evidence submitted by Plaintiff does not establish a genuine issue of material fact, and no affidavits accompany her response.[2] Rule 56(e), providing

[2] A complaint may be treated as an affidavit if it alleges facts within a plaintiff's personal knowledge and is sworn under penalty of perjury. Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991). Neither the complaint (Doc. 1), the first amended complaint (Doc. 2), or the various responses (Docs. 116, 117, 118 & 119), are verified. In Jaxon v. Circle K Corp., 773 F.3d 1138, 1140 (10th Cir. 1985), the court determined that the district court abused its discretion in not granting the a (sic) pro se plaintiff additional time to verify his complaint or obtain affidavits to remedy the "obvious defects" in his summary judgment materials.

Here, after being served with numerous affidavits, Plaintiff has made no such request. Moreover, this is case in which the scope of discovery has been actively litigated and the magistrate judge informed the Plaintiff of the option to file an affidavit, at least in the Fed. R. Civ. P. 56(f) context, but she did not. Doc. 69 at 2; Doc. 86 at 6. The court notes that Plaintiff did file an affidavit in connection with seeking the clerk's entry of default against Defendant Arley Sanchez. Doc. 89. Moreover, Plaintiff recited D.N.M. LR-Civ. 56.1(a), in arguing that summary judgment should be denied because the IPTR had not set dates. Doc. 119 at 2. That rule alerts (as does Fed. R. Civ. P. 56(c) &

for affidavits based upon personal knowledge, requires a non-movant to go beyond the pleadings and designate specific facts (as opposed to unverified assertions) showing there is a genuine issue for trial. Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024 (10th Cir. 1992). Allegations by Plaintiff contained in her responses and her unverified first amended complaint do not fulfill that function and are not competent summary judgment evidence. Id.; King v. Dogan, 31 F.3d 344, 346 (5th Cir. 1994). Thus, although the qualified immunity analysis on summary judgment usually begins with analysis of the constitutional rights at issue, and whether those rights are clearly established, the court cannot overlook that Plaintiff's allegations are largely unsupported.

In addition to lacking a factual predicate for the violation of constitutional rights, the Plaintiff largely has failed to define the specific constitutional rights at issue. It is not enough for Plaintiff to merely state that her Fifth, Sixth and Fourteenth Amendment rights, her due process rights, or her rights to be free of a

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(e)) as to the need "for the opposing party to file counter-affidavits and responses" to a summary judgment motion. Plaintiff has repeatedly cited Anderson, including the following passage: "The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden in producing in turn evidence that would support a jury verdict." Anderson, 477 U.S. at 256, cited in Doc. 119 at 21, ¶ 54; see also Doc. 116 at 16. The next sentence in Anderson makes clear that "Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading ...." Anderson, 477 U.S. at 256. Apparently, Plaintiff's position is that her allegations and the documentary evidence are sufficient to support a jury verdict. Doc. 119 at 21, ¶ 54.

§ 1983 conspiracy have been violated, or that she has been maliciously prosecuted, falsely arrested, falsely imprisoned, or deprived of liberty without due process of law. Rather, the Plaintiff must be specific with reference to the circumstances facing the Defendants and the applicable law. See Anderson v. Creighton, 483 U.S. 635, 639-40 (1987). Otherwise, qualified immunity with its emphasis on objective legal reasonableness could not be applied. Id. At 639. That said, the primary thrust of Plaintiff's complaint appears to be Fourth Amendment where the law is clearly established that an affiant may not lie to obtain an arrest warrant. Wolford v. Lasater, 78 F.3d 484, 489 (10th Cir. 1996).

The court now turns to the remaining Defendants.

1. Defendant Steve Scharon.

Plaintiff contends that Defendant Scharon, an investigator with the New Mexico Attorney General's Office, conducted a shoddy and negligent investigation into her allegations that Defendant John Mallory had committed perjury in an affidavit seeking a warrant for her arrest. Defendant Scharon concluded that Plaintiff's allegations were unfounded after interviewing her. Plaintiff contends that his investigation contributed to her unlawful imprisonment on July 11, 1997. Plaintiff has not identified a clearly established constitutional right to be free of a negligent investigation; what authority exists suggests the contrary. See Romero v. Fay, 45 F.3d 1472, 1478-79 (10th Cir. 1995); Williams v. City of Albany, 936 F.2d 1256, 1260-61 (11th Cir. 1991) (per curiam).

2. Defendant Audi Miranda.

Plaintiff contends that Defendant Audi Miranda maliciously prosecuted her based upon a criminal complaint in January 1998 charging her with telephone harassment based upon repeated derogatory calls to the VCSO. She contends that his investigation was inadequate, he failed to obtain her correct address, he did not consent to quashing the warrant, he threatened Plaintiff's attorney, and he participated in an illegal disposition of the charge against her. She also contends that he participated in a conspiracy with other Defendants.

The summary judgment evidence establishes that Defendant Miranda attempted to contact the Plaintiff during the investigation. Because Plaintiff did not have a published

telephone number, he relied upon Department of Motor Vehicle records which contained an outdated address. He was unable to contact Plaintiff and the complaint contained the incorrect address. A bench warrant was issued for Plaintiff's arrest. That bench warrant was later quashed and Plaintiff, represented by counsel, entered into an agreement continuing the matter for one year with dismissal at that time if Plaintiff complied with various conditions including anger management counseling and not contacting the parties involved. Although Plaintiff contends that Defendant Miranda could have obtained her correct address. Moreover,

Defendant Miranda's affidavit is to the contrary. Doc. 93, ¶ 10.

Plaintiff's malicious prosecution and derivative claims against Defendant Miranda must fail given the summary judgment evidence which establishes that Defendant Miranda had probable cause to conclude that a violation of N.M. Stat. Ann. §§ 30-21-12 (michie 1994 Repl. Pamp.) had occurred, even considering the discrepanciesices Plaintiff claims are in the affidavit. See Taylor v. Meacham, 82 F.3d 1556, 1561-62 (10th Cir. 1996); Wolford, 78 F.3d at 489. "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable ... will the shield of immunity be lost." Malley v. Biggs, 475 U.S. 335, 344-45 (1986) (citations omitted). Here, VCSO employees Debra Mallory and Connie Carter provided statements and telephone logs tending to show that Plaintiff had called nine times between 12:21 a.m. and 10:24 a.m., using obscene and derogatory language. Doc. 93, Ex. A, B. C, &D. Though the New Mexico Court of Appeals

has cautioned that § 30-21-12 requires that calls be made maliciously, thereby excluding "a call by an irate citizen to a

public official," State v. Gattis, 730 P.2d 497, 501 (N.M. Ct. App. 1986), the alleged language used here ("Spread the word—I'll slap so f—— hard you will end up in another city."), plainly falls within the prohibition on telephoing "threaten[ing] to inflict injury or physical harm to the person ... of another." § 30-20-12(a); State v. Stephens, 807 P.2d 241, 245 (N.M. Ct. App. 1991). Three messages ("Tell Lisa at the court to go such d — ..."), are plainly

indicative of malicious intent to disturb another. See § 30-20-12(B). Plaintiff fails to recognize that her alleged activity also interfered with the performance of legitimate law enforcement functions, i.e. dispatching emergency calls.

In New Mexico, a peace officer may file a criminal complaint in magistrate court and prosecute it. N.M.R. Ann. § 6-108(a) & (C); see also N.M. State. Ann. Stat. Ann. §§ 29-1-1- (peace officer's duty "to diligently file a complaint or information"); 29-2-18 (state police officer has "full power to apprehend, arrest and bring before the proper court all law violators within the state") (Michie 1997 Repl. Pamp.). That is apparently what happened here. Still, Plaintiff's claim that Defendant Miranda withheld approval of an order quashing the bench warrant simply does not state a constitutional claim given that the magistrate judge determines whether to quash and under what conditions. Moreover, even Plaintiff's summary judgment evidence indicates that the warrant was quashed (albeit a few days later) with the approval of Defendant Miranda. Doc. 116, Ex. H. Plaintiff's claim that Defendant Miranda was party to an illegal disposition of the charges against Plaintiff and threatened her attorney is devoid of factual support. Plaintiff's dissatisfaction with the deposition she agreed to

does not provide a claim against Defendant Miranda. Likewise, her wide-ranging claims of conspiracy against many of the moving Defendants are not supported by admissible evidence—a § 1983 conspiracy to deprive a person of her constitutional rights is actionable, but requires specific facts showing an agreement and

concerted action among the defendants; conclusory allegations of conspiracy are inadequate. See Tonkovich v. Kansas Bd. Of Regents, 159 F.3d 504, 533 (10th Cir. 1998). Plaintiff's allegations that the VCSO, judges, court employees and others conspired against her are purely conclusory..

3. The Valencia County Defendants.

Plaintiff points out that the qualified immunity defense does not resolve the official capacity claims, which is correct insofar as it goes. However, official capacity claims against individuals are really claims against the entity that employs the individual, and Plaintiff's attempt to state official capacity claims against individual Defendants must be resolved accordingly. Kentucky v. Graham, 473 U.S. 159, 165 (1985). To be sure, a municipality may not rely on the doctrine of qualified immunity. Owen v. City of Independence, Mo., 445 U.S. 622, 657 (1980). But municipal liability does not lie based upon respondeat superior; rather there must be action pursuant to a municipal custom or policy that directly caused the constitutional violation. City of Canton, Ohio v. Harris, 489 U.S. 378, 385 (1989); Monell v. Dep't of Social Servs., 436 U.S. 658, 691 (1978). No detailed, non-conclusory allegations in the complaint, nor any competent summary judgment evidence, supports a custom or policy on behalf of Valencia County, the Valencia County Commission or its Commissioners,[3] let

[3] The Valencia County Commission and its Commissioners would be entitled to absolute legislative immunity for legislative activities, including action

alone a direct causal link to a constitutional violation. Plaintiff claims that these entities and unnamed individuals negligently failed to prevent harm, but mere negligence is not actionable under § 1983 or the United States Constitution. Davidson v. Cannon, 474 U.S. 344, 347-48 (1986); Daniels v. Williams, 474 U.S. 327, 333 (1986). Although Plaintiff contends that the conduct or lack thereof was "gross negligence," this is a conclusion and is not sufficient for § 1983 liability in this circuit. Johnson v. Martin, 195 F.3d 1208, 1219 (10th Cir. 1999); Woodward v. City of Worland, 977 F.2d 1392, 1399 n. 11 (10th Cir. 1992); see also County of Worland, 977 F.2d 1392, 1399 n.11 (10th Cir. 1992); see also County of Sacramento v. Lewis, 523 U.S. 833, 863 (Scalia, J., concurring in judgment) (open question whether something less than intentional conduct, such as recklessness or gross negligence, can constitute violation of due process).

Moreover, it appears that certain claims against the Valencia County Defendants are time barred. Plaintiff filed her initial complaint on February 17, 2000. Her claims relating to contacting her in California in 1996 and charging her with assault and telephone harassment on November 18, 1996, do not appear actionable in and of themselves. A three-year statute of limitations applies. Wilson v. Garcia, 471 U.S. 261, 280 (1985); N.M. Stat. Ann. § 37-1-8 (Michie 1990 Repl. Pamp.). Contrary to Plaintiff's suggestion, the accrual of a § 1983 claim is a federal issue, and such a claim accrues when facts that would support a

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on Plaintiff's complaints. Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998).

cause of action are or should be apparent. Fratus v. Deland, 49 F.3d 673, 675 (10th Cir. 1995). Record evidence suggests that Plaintiff was aware of her claims that (1) Defendant John Mallory contacted her ostensibly without jurisdiction at least by December 21, 1996, and (2) she was being maliciously prosecuted, as evidence in her letter dated December 21, 1996, complaining of same to the district attorney. Doc. 103, Ex. C; see also Laurino v. Tate, 220 F.3d 1213, 1216-17 (10th Cir. 2000) (rejecting contention that claims accrued when proceedings on charges concluded; claims accrued on date of arrest and release from jail). However, the Valencia County Defendants did not move for summary judgment on this claim, but relied exclusively on a motion to dismiss which is contested. Doc. 105, at 3 (Valencia County Defendants' supporting memorandum). The case can be resolved on other grounds, however.

A. John Mallory.

Plaintiff complains that Defendant John Mallory is responsible for malicious prosecution, its derivative claims such as false arrest and false imprisonment, and denial of due process based upon his filing of criminal complaints and his participation in prosecuting her. Defendant John Mallory investigated a complaint by Defendant Arley Sanchez that he was being harassed by the Plaintiff. The court has reviewed the August 1, 1996, police report, and

the affidavits submitted by Defendant John Mallory[4] and the complainant Defendant Sanchez. Doc. 119, Ex. E; Doc. 103, Exs. A & B. These items show that Defendant Mallory had probable cause to file the November 1996 complaint based upon telephone harassment, N.M. Stat. Ann. § 30-20-12 (Michie 1994 Repl. Pamp.), and the February 1997 complaint based upon telephone harassment and stalking, § 30-3A-3;

State v. Duran, 966 P.2d 768, 773 (N.M. Ct. App. 1998); see also Davis v. Gracey, 111 F.3d 1472, 1479-80 (10th Cir. 1997) (the failure of an affidavit for search warrant to describe every detail does not vitiate probable cause). Indeed, Plaintiff requested that Defendant Mallory press charges resulting in the November 1996 complaint, as she was angered by his incorrect information that telephone harassment was a felony. Doc. 103, Ex. E. She also admitted in a letter sent to the district attorney that she was guilty of phone harassment, but not stalking based upon the Feburary 1997 complaint. Id.

The more troubling question concerns the course of proceedings on July 11, 1997, on Plaintiff's alleged violation of the stipulated order of dismissal of the February 1997 complaint. Unlike Plaintiff's other claims, this concerns post-trial detention. On June 27, 1997, Defendant John Mallory faxed a letter to a magistrate judge indicating that Plaintiff violated the stipulated order. The

[4] Defendant John Mallory was not deprived of his jurisdiction to investigate Defendant Sanchez's claims merely because Plaintiff was in California. See §30-20-12(C) (telephone offense deemed to be committed at either where call originated or where call received).

February 1997 criminal complaint had been dismissed without prejudice when Plaintiff agreed to the mandatory conditions of not contacting Defendant Arley Sanchez or Defendant John Mallory. Doc. 103, Ex. D. After one year, the case would be dismissed with prejudice if Plaintiff complied with the conditions. Id. By letter to the magistrate judge, Defendant Mallory reported that Plaintiff had violated those conditions, and he requested an arrest warrant to apprehend the Plaintiff and that she be held without bond. Doc. 119, Ex. H.

Plaintiff's own summary judgment evidence contains evidence indicating that Defendant John Mallory had probable cause to believe that the mandatory conditions had been violated--she repeatedly left messages for him demanding that she be afforded a trial as she was unhappy with the agreement her attorney negotiated. Id. Defendants' summary judgment evidence contains affidavits from both Defendant John Mallory and Defendant Arley Sanchez that the harassment resumed after the Plaintiff entered into the stipulated order. Doc. 103, Exs. A at ¶ 44 & B at ¶ ¶ 28-29; see also id. Ex. G at unnumbered page 3, unnumbered full ¶ 7 ("Recently, I accepted a deal fashioned by my attorney that the charges would be dropped if I didn't contact Arley Sanchez or Mallory for one year. I deliberately broke that agreement several times last week and this week to bring this case to trial. My attorney, a public defender, pushed for a deal, although I told her I wanted a trial because I was innocent on the stalking charge").

Apparently, Plaintiff appeared voluntarily. At the hearing, Defendant John

Mallory testified. His testimony as a witness is protected by absolute immunity. Briscoe v. LaHue, 460 U.S. 325, 345-46 (1983). Plaintiff was not represented by counsel. The magistrate court judge found that Plaintiff was in violation of the May 1997 agreement. Although the stalking and harassment charges had been dismissed without prejudice, he then sentenced her on those charges to ninety days with eighty-five days suspended. Doc. 119, Ex. J. Plaintiff was taken into custody and served five days. She later had the "Judgment and Sentence" expunged, given that she had never pled guilty to the charges which had been dismissed and not refilled. Doc. 119, Ex. I & J.

Plaintiff argues that Defendant John Mallory, as a prosecutor, was responsible for insuring that her constitutional rights were respected at the "trial" which occurred on July 11, 1997. Defendant John Mallory as a signatory was no doubt aware of the stipulated order and its mandatory conditions. However, his decision to inform the magistrate judge of the violation of its conditions and seek an arrest warrant and a psychological evaluation is simply not the proximate cause of the apparent constitutional violations that followed. A peace officer who informs the court of a violation of an order dismissing charges and seeks an arrest warrant cannot be held responsible for insuring that the magistrate judge observes the basic tenets of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution in the disposition of a criminal case, i.e. a charging document, arraignment, appointment of counsel, notice of trial, the right to call

and confront witnesses, and the like. Cf. Baker v. McCollan, 443 U.S. 137, 145 (1979); Pickens v. Hollowell, 59 F.3d 1203, 1207-08 (11th Cir. 1995). And given the mandatory provisions contained in the stipulated order, the court cannot say an objectively reasonable police officer would have thought the judge acted without all jurisdiction. Although Plaintiff contends that there is a tape of the show cause hearing, Doc. 119 at 18, she has failed to provide a transcript (or the tape). Without more, she cannot defeat Defendant John Mallory's properly supported motion for summary judgment based upon qualified immunity. Thus it is unnecessary to address the obvious prosecutorial immunity question presented by these facts. See Kalina v. Fletcher, 522 U.S. 118, 123-26 (1997).

B. Wes Mallory, D.C. Jackson, and Juan Julian.

Plaintiff contends that Defendant Captain Wes Mallory, Undersheriff D.C. Jackson and Sheriff Juan Julian were indifferent and hostile to her complaints about Defendant John Mallory and failed to protect her constitutional rights. She notes that Defendant Wes Mallory was present at the July 11, 1997, hearing. First, the court has rejected the notion that the moving Defendants were responsible for defects in the magistrate court proceedings. Second, supervisory liability requires a "show[ing] that the defendant-supervisor took deliberate action in directing the constitutional violation and allowed the violation to continue." DeAnzona v. City and County of Denver, 222 F.3d 1229, 1234 (10th Cir. 2000). The allegations in Plaintiff's

first amended complaint do not rise to this level. Moreover, her letter to the news media and others about her interactions with supervisory law enforcement personnel and the allegations in her first amended complaint are not suitable evidence to defeat summary judgment. Gross v. Burggraf Const. Co., 53 F.3d 1531, 1541 (10th Cir. 1995) (heresay cannot be considered). Second, having determined the absence of a constitutional violation on Defendant John Mallory's part, there can be no derivative liability for his conduct. City of Los Angeles v. Heller, 475 U.S. 796, 798-99 (1986).

C. Debra Mallory, Connie Carter, Anna Marquez and Donna Ward

Plaintiff contends that VCSO employees Debra Mallory (administrative secretary), Connie Carter (dispatcher), Anna Marquez (administrative secretary), and Donna Wardlaw (civil clerk) are liable for their role in the December 1997 complaint. Defendants Debra Mallory and Carter prepared witness statements concerning Plaintiff's

calls to the VCSO. Defendant Marquez witnessed Defendant Debra Mallory's statement. Plaintiff also contends that Defendant Debra Mallory is responsible for the out-of-date address appearing on the complaint. These Defendants have submitted affidavits that they received rude, derogatory calls at the VCSO using profanity from Plaintiff. Doc. 103, Ex. H, I, J & K. Defendants Debra Mallory and Carter swear their records are accurate; all of the Defendants swear that they did not urge prosecution by the State Police. No competent summary judgment evidence refutes this. There is no

basis for an actionable constitutional claim here.

Many of the federal claims in the 58-page complaint containing twenty-five counts are redundant. Any remaining federal claims not specifically addressed above have been considered and rejected as without merit in light of the Defendants' motions and the applicable law.

Given the resolution of the federal claims, only the supplemental state law claims remain. When federal claims support supplemental jurisdiction, the Tenth Circuit has recognized that, consistent with 28 U.S.C. § 1367(c)(3), the ordinary response will be to dismiss the state claims without prejudice. See Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1237 (10th Cir. 1997); Ball v. Renner, 54 F.3d 664, 669 (10th Cir. 1995); see also United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."). The court declines to exercise jurisdiction over the state claims against these moving Defendants; those claims will be dismissed without prejudice.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that the following motions are construed as motions for summary judgment to the extent set forth in this Memorandum Opinion and are granted to the extent of all federal claims contained in the first amended complaint:

(1) Defendants Steve Scharon, Carla Gonzales, Lisa (Waggoner) Mattox and Teresa Chavez' Motion to Dismiss and/or for Summary Judgment filed October 19, 2000 (doc. 92);

(2) Defendants Audi Miranda, Joanne Sanchez and Brenda Gallegos' Motion to Dismiss and/or for Summary Judgment filed October 19, 2000 (doc. 91);

(3) the Motion to Dismiss on behalf of Defendant Valencia County Sheriff's Department, Deputy John Mallory, Captain Wes Mallory, Sheriff Juan Julian, Undersheriff D.C. Jackson, Debra Mallory, Donna Wardlaw, Conne Carter, Anna Marquez, and Valencia County Commission ("the Valencia County Defendants") filed October 20, 2000 (doc. 104);

(4) the Motion for Summary Judgment on behalf of the Valencia County Defendants filed October 20, 2000 (doc. 102).

The federal claims against the moving defendants will be dismissed with prejudice; any state law claims will be dismissed without prejudice.

DATED this 22nd day of March 2001, at Santa Fe, New Mexico.

s/Paul Kelly Jr.
United States Circuit Judge
Sitting by Designation

Counsel:

Karen Williams, pro se.

Sean Olivas and Melanie Frassanito, Keleher & McCleod (sic) McLeod, P.A., Albuquerque, New Mexico, for the Valencia County Defendants.

Barbara Pryor, McCary, Wilson and Pryor, Albuquerque, New Mexico, for (sic) State of New Mexico Defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

KAREN J. WILLIAMS,

Plaintiff,

Vs. No. 00-0240 PK/LFG

VALENCIA COUNTY SHERIFF'S OFFICE ("VCSO") ET AL.

FINAL JUDGMENT ON ALL FEDERAL CLAIMS (EXCEPT THOSE ASSERTED AGAINST DEFENDANT ARLEY SANCHEZ)

THIS MATTER came on for decision on all federal claims contained in the Plaintiff's first amended complaint. The court rendered its decisions (Docs. 47, 109 & 129), resolving all federal claims in favor of Defendants, except those asserted against Defendant Arley Sanchez, who defaulted. Pursuant to Fed. R. Civ. P. 54(b), the court makes the express determination that there is not just reason for delay and hereby enters judgment on all federal claims in favor of all named Defendants, except Defendant Arley Sanchez, contained in the Plaintiff's first amended complaint.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that the Plaintiff take nothing on her federal claims against the Defendants Valencia County Sheriff's Office, John Mallory, Wes Mallory, Juan Julian, D.J. Jackson, Debra Mallory, Donna Wardlaw, Connie Carter, Anna Marquez, Carla Gonzales, Lisa (Waggoner) Mattox, Teresa Chavez, Brenda Gallegos, J. (Joanne) Sanchez, Valencia County Commission and its Commissioners from 1997 to

present, Audi Miranda, Steve Scharon, State of New Mexico, New Mexico Attorney General's Office, New Mexico Department of Public Safety and the Drug Enforcement Administrative, that the federal action against these Defendants be dismissed with prejudice, and that the

Plaintiff and these Defendants each bear their own costs of action on the federal claims.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all state-law claims contained in the first amended complaint are dismissed without prejudice.

DATED this 22nd day of March 2001, at Santa Fe, New Mexico.

s/Paul Kelly Jr.
United States Circuit Judge
Sitting by Designation

APPENDIX (EXHIBIT EXCERPTS A and B]

A. Excerpts from Williams's 58-page First Amended Civil Complaint for Violations of the Plaintiff's Civil and Constitutional Rights Under the U.S. Constitution and State and Federal Law, filed May 24, 2000.

At 1-4 (in part): "COMES NOW, Plaintiff Karen J. Williams in this complaint, respectfully alleges:

"This is a civil action for injuries to the person and reputation of Plaintiff Karen J. Williams, a resident of the city of Albuquerque, Bernalillo County, New Mexico for violations of her civil and constitutional rights arising under the Constitution of the United States, Fourth Amendment, which gives citizens the right to be secure in their persons against unreasonable searches or seizures, and no warrants shall issue but upon probable cause, and for the Fourteenth Amendment, which mandates due process .. arising under the Constitution of the United States, Sixth Amendment, which gives citizens the right to trial, the right to be informed of the nature and cause of the accusation, the right to be confronted with the witnesses against him, to have compulsory process of obtaining witness in his favor, and to have the assistance of counsel for his defense. This is also a civil action under the Fifth Amendment ... arising under the Constitution of the Untied States, Eighth Amendment, which states that excessive bail shall not be required, nor excessive fines imposes, nor cruel and unusual punishments inflicted ... This Court has jurisdiction by reason of 28 U.S.C.A § 1331 ... This is a civil action for injuries to the person and reputation of Plaintiff Karen J. Williams arising under the provisions of 42 U.S.C.A § 1983 ... Jurisdiction is conferred on this Court by 28 U.S.C.A § 1343 ...Venue is proper in this Court."

At 4-8: "This is a civil action for damages resulting in injuries to the person and the reputation of PLAINTIFF KAREN J. WILLIAMS against the Valencia County Sheriff's Office; its law enforcement supervisors, including Sheriff Juan Julian, Undersheriff DJ Jackson, Captain Wes Mallory; and those other law enforcement officers, past and present, involved in incidents leading to this lawsuit, including Detective John Mallory aka DEA Officer, who also works or did work as a task force agent for the U.S. Drug Enforcement Administration, for committing acts, under color of law (42 U.S.C. § 1986 (1983)) and for conspiring to deprive her of equal protection under the law and due process (42 U.S.C. § 1985 and 42 U.S.C. § 1986), resulting in Plaintiff KAREN J. WILLIAMS being deprived of her rights as secured under the U.S. Constitution, the New Mexico Constitution, and the laws of New Mexico and the United States of America. 14. The aforementioned defendants refused and neglected to prevent such deprivations of law to the plaintiff, under U.S. CONST. Amend(s) V, VI, VIII, and XIV, including but not limited to the right to be secure in her person from false arrest and false imprisonment, improper or illegal warrants, the right to make bail, the right to due process under law, the right to equal protection under the law, as well as protection against cruel and unusual punishment, malicious prosecution, and criminal behavior such as perjury. ... acting under color of law, within the meaning of 42 U.S.C. § 1983, and he is a law enforcement officer within the meaning of New Mexico Statute Section 41-12-12. ...

At 14-22 Factual Background "46. In mid-1996, Defendant Agent Mallory and the VCSO began a long-term policy of maliciously prosecuting the Plaintiff ... 49. On or about February 10, 1997, the Plaintiff refiled charges at the Los Lunas Magistrate Court against Defendant Arley Sanchez, as they had previously been dismissed due to insufficient

address. .. 52. On or about February 12, 1997, Defendant Arley Sanchez filed false charges against the Plaintiff (case no. M-59-MR-96-10165) in the Los Lunas Magistrate Court for allegedly stalking him and allegedly phone harassing him. ... 54. Using a police report showing the date August 1, 1996, and an affidavit for arrest dated February 12, 1997, Defendant Agent Mallory conspired with Defendant Arley Sanchez and the aforementioned April to have the Plaintiff arrested on a no-bond warrant, constituting conspiracy, malicious prosecution, false arrest and false imprisonment. ... 80. On or about September 3, 1997, the Plaintiff's unconstitutional sentence was overturned by court order ...

B. Excerpts from the twenty-six (26) counts in Williams's amended complaint, at 23-56, filed May 24, 2000.
At 25-26 *Count III* Perjury 42 U.S.C. § 1983 and 42 U.S.C. § 1985 (and) 42 U.S.C. § 1986 116. The allegations contained in paragraphs 1 through 115 are hereby incorporated by reference. 117. Defendant Agent Mallory knowingly filed a false misdemeanor charges against the Plaintiff ...in a complaint endorsed February 12, 1999 ... thereby committing perjury. 118. Defendant Agent Mallory knowingly wrote and filed with the court a police report showing the date of August 1, 1996, which contained information he knew to be false ... 120. Under 42 U.S.C. § 1983, Defendant Agent Mallory and the VCSO, as well as its supervising officers, Defendants Sheriff (Juan) Julian, Undersheriff (DC) Jackson and Captain (Wes) Mallory lose immunity from prosecution when they knowingly engage in behavior and actions, under color of law, which deprive a citizen of his or her rights ... 123. As a direct and proximate cause ... the Plaintiff suffered emotional distress, mental pain, embarrassment and humiliation.